

**LIBRARY  
SUPREME COURT  
TRANSCRIPT OF RECORD**

---

---

**Supreme Court of the United States**

**OCTOBER TERM, 1951**

**No. 522**

---

**JOSEPH BURSTYN, INC., APPELLANT,**

**vs.**

**LEWIS A. WILSON, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, ET AL.**

---

**APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK**

---

---

**FILED JANUARY 10, 1952**

**PROBABLE JURISDICTION NOTED FEBRUARY 4, 1952**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 522

JOSEPH BURSTYN, INC., APPELLANT,

vs.

LEWIS A. WILSON, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234	1	1
Order to show cause, Supreme Court	3	1
Petition	6	3
Exhibit "A"—Order to show cause before a designated committee of the Respondents, etc.	15	8
Exhibit "B"—Report of the Committee of the Whole	17	10
Supporting affidavit of Joseph Burstyn	20	12
Answer	28	17
Special Term Exhibit 1—Report of the Committee of the Whole	42	25
Special Term Exhibit 2—Order to show cause directed to Joseph Burstyn, Inc.	44	27
Special Term Exhibit 3—Order to show cause directed to Lopert Films, Inc.	47	28
Special Term Exhibit 4—Minutes of meeting, January 30, 1951	50	30
Special Term Exhibit 5—Statement of John C. Farber, counsel for Joseph Burstyn	63	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEB. 20, 1952.

## Statement under Rule 234—Continued

## Answer—Continued.

	Original	Print
Special Term Exhibit 6—Affidavit of Joseph Burstyń	66	42
Exhibit 1—Translation of statement dated December 30, 1950 of The Office of the President of the Council of Ministers	73	46
Exhibit 2—Translation of statement dated December 30, 1950 of the President of the Italian Motion Picture Industry	75	47
Exhibit 3—Translation of affidavit dated December 30, 1950 of Director of the Venice Film Festival	78	48
Special Term Exhibit 7—Report of the Committee dated February 15, 1951 on "The Miracle"	79	48
Special Term Exhibit 8—Report dated February 16, 1951 of the Committee of the Whole	87	54
Special Term Exhibit 9—Answer to Ephraim S. London from Charles A. Brind, Jr., dated January 23, 1951 and letter from Ephraim S. London to Charles A. Brind, Jr., dated January 22, 1951	90	56
Special Term Exhibit 11—Order transferring proceeding to appellate division	98	60
Special Term Exhibit 12—Italian dialogue, English translation and English subtitles	101	61
Stipulation of facts	130	86
Notice of appeal to Court of Appeals, Supreme Court	133	86
Order of Appellate Division appealed from	137	87
Opinion of Appellate Division, Foster, P.J.	139	88
Stipulation with respect to exhibits in Court of Appeals	149	95
Description of exhibits and excerpts	I	95
Exhibit 6—Article in a symposium in THE CHURCHMAN	5	114
Exhibit 7—Letter dated January 29, 1951 from Rev. John Dillenberger, Evangelical Reformed Church to Board of Regents	16	122
Exhibit 8—Letter dated January 29, 1951 from Rev. Frederick T. Schumacher, Evangelical Reformed Church to Board of Regents	18	123
Exhibit 9—Letter dated January 25, 1951 from Rev. Harold C. DeWindt, West Park Presbyterian Church to Board of Regents	19	124
Exhibit 12—Letter dated January 26, 1951 from Rev. W. J. Beeners to Board of Regents	23	125
Exhibit 13—Letter dated January 25, 1951 from Rev. Albert J. Penner, Broadway Tabernacle (Congregational) Church to Board of Regents	24	126

## Statement under Rule 234—Continued

## Description of exhibits and excerpts—Continued

## Exhibits—Continued.

	Original	Print
Exhibit 14—Petition dated January 16, 1951 from 10 Clergymen to Board of Regents	26	127
Exhibit 16—Letter dated January 26, 1951 from Rev. Kenneth D. Barringer, First Methodist Church to Mr. Ephraim S. London	28	128
Exhibit 23—Letter dated January 26, 1951 from Prof. Paul Lehmann, Princeton Theological Seminary to Board of Regents	42	129
Exhibit 26—Petition dated February 1, 1951 to Board of Regents	46	131
Exhibit 34—Letter dated January 26, 1951 from Prof. W. T. Stace, Princeton University to Mr. London	63	135
Exhibit 53-A—Letter dated January 27, 1951 from Alfred H. Barr, Jr., Director of Museum of Modern Art to Herald Tribune	90	137
Exhibit 53-E—Letter dated February 1, 1951 from Rabbi B. J. Bamberger, West End Synagogue to Board of Regents	96	138
Exhibit 75—Editorial in the Washington, D. C. Post, December 31, 1950	150	139
Exhibit 76—Editorial in the Boston, HERALD, Jan- uary 2, 1951	151	140
Remittitur of the Court of Appeals	153	141
Judgment of the Supreme Court on Remittitur	157	143
Opinion of Court of Appeals, Froessel, J.	162	144
Concurring opinion, Desmond, J.	178	158
Dissenting opinion, Fuld, J.	180	159
Petition for appeal	196	172
Order allowing appeal	197	173
Citation on appeal (Omitted in printing)	199	
Assignment of errors	201	173
Præcipe	205	176
Counter-præcipe	209	179
Statement of points to be relied upon and designation of record	213	180
Counter designation of record	221	184
Order noting probable jurisdiction	226	185

[fol. 1]

**IN SUPREME COURT OF STATE OF NEW YORK,  
APPELLATE DIVISION, THIRD JUDICIAL DE-  
PARTMENT**

In the Matter of

◦ The Application of JOSEPH BURSTYN, Inc., Petitioner,  
For an Order Pursuant to Article 78 of the Civil Practice Act  
against

LEWIS A. WILSON, Commissioner of Education of the State  
of New York, and John P. Myers, William J. Wallin,  
William Leland Thompson, George Hopkins Bond, W.  
Kingsland Macy, Edward R. Eastman, Welles V. Moot,  
Caroline Werner Gaunett, Roger W. Straus, Dominiek F.  
Maurillo, John F. Brosnan and Jacob L. Holtzmann, as  
Regents of the University of the State of New York,  
Respondents

**Statement Under Rule 234**

Proceeding to review, pursuant to Article 78 of the Civil  
Practice Act, a determination of the Commissioner of Edu-  
cation and the Board of Regents of the University of the  
State of New York, which cancelled and rescinded the  
license issued on November 30, 1950, to Joseph Burstyn,  
Inc., to show the motion picture "The Miracle."

[fol. 2] The parties are as stated above and there has not  
been any change of parties or attorneys since the commence-  
ment of this action on February 16, 1951.

[fol. 3] **IN SUPREME COURT OF NEW YORK, COUNTY OF ALBANY**

[Title omitted]

**ORDER TO SHOW CAUSE—February 16, 1951**

Upon the annexed petition of Joseph Burstyn, Inc., duly  
verified the 16th day of February, 1951, upon the annexed  
affidavit of Joseph Burstyn, sworn to February 14, 1951,  
and upon all the papers and proceedings had herein,

Let the Respondents above named, Lewis A. Wilson, [fol. 4] Commissioner of Education of the State of New York, and John P. Myers, William J. Wallin, William Leland Thompson, George Hopkins Bond, W. Kingsland Maeby, Edward R. Eastman, Welles V. Moot, Caroline Werner Gannett, Roger W. Straus, Dominick F. Maurillo, John F. Brosnan and Jacob L. Holtzman, as Regents of the University of the State of New York, show cause at a Special Term of this Court to be held in and for the County of Albany at the County Court House, City of Albany, New York; on the 16th day of February, 1951, at three o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard *why* an order should not be made and entered herein granting a review under Article 78 of the Civil Practice Act of the determination and order of the said Respondents rescinding and cancelling the licenses heretofore issued for the exhibition of the motion picture films "The Miracle" and "Ways of Love" to the end that this Court on such review may annul the determination and order of the Respondents according to law and why Respondents and each of them, their deputies, agents and employees should not be restrained and enjoined from proceeding with the order rescinding and cancelling the licenses for the exhibition of the motion picture films "The Miracle" and "Ways of Love" and from enforcing the order and cancellation and revocation with respect thereto, and why the Petitioner should not have such other and further relief as this Court may deem just and proper.

Sufficient reason appearing therefor, let service of a copy [fol. 5] of this Order to Show Cause, together with the petition and affidavit annexed thereto, upon Charles A. Brind, Jr., Esq., attorney for the Respondents, on or before 2 P. M. of the 16th day of February, 1951, in accordance with Section 1289, 1951, in accordance with Section 1289 of the Civil Practice Act, be deemed good and sufficient service.

Dated • Albany, N. Y., February 16, 1951,

Kenneth S. MacAffer, Justice of the Supreme Court  
of the State of New York.

[fol. 6] IN SUPREME COURT OF NEW YORK.

PETITION—February 16, 1951

To the Supreme Court of the State of New York:

The petition of Joseph Burstyn, Inc., respectfully shows and alleges:

1. At all times hereinafter mentioned Petitioner was and still is a corporation organized under the laws of the State of New York.

2. At all times hereinafter mentioned Petitioner was and still is engaged in the business of distributing motion picture films, which business consists of purchasing motion picture films and the right to exhibit motion picture films publicly, and the leasing of films for profit to owners and operators of motion picture theaters throughout the United States and its territories.

3. The Respondent Lewis A. Wilson, is Commissioner of Education of the State of New York, the chief administrative officer of the Department of Education of the State of New York. The Respondents John P. Myers, William J. Wallin, William Leland Thompson, George Hopkins Bond, W. Kingsland Maey, Edward R. Eastman, Welles V. Moot, Caroline Werner Gannett, Roger W. Straus, Dominick F. Maurillo, John F. Brosnan, and Jacob L. Holtzmann are the members of the Board of Regents of the University of [fol. 7] the State of New York, which Board is the governing body of the University of the State of New York.

4. The Motion Picture Division of the Education Department of the State of New York (hereinafter referred to as "the Division") is an official body of the State of New York duly constituted and functioning under and by virtue of the provisions of Article 3 of the Education Law of the State of New York. Article 3 of the Education Law provides in part that the Division shall, upon submission of a motion picture film with the appropriate application for license and payment of prescribed fees, cause an examination of the motion picture film to be made and shall license such film to be exhibited at places of amusement, unless such film or a part thereof is obscene, indecent, immoral, inhuman or

sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime.

5. On March 2, 1940, a license, bearing serial number TA51033, was duly issued by the Division to Lopert Films, Inc., a New York Corporation, for the exhibition of a motion picture film with Italian dialogue, entitled "Il Miracolo" (hereinafter referred to under the English translation of that title, namely, "The Miracle").

6. Thereafter and prior to the times hereinafter mentioned, the Petitioner purchased from Lopert Films, Inc., the exclusive right to distribute and lease "The Miracle" for exhibition throughout the United States and its territories.

7. Thereafter Petitioner purchased the exclusive right [fol. 8] to distribute and lease the French language motion picture films entitled "Jofroi" and "A Day in the Country" for exhibition throughout the United States and its territories, and the Petitioner then combined the said films with "The Miracle" as a film trilogy under the title "Ways of Love."

8. On November 30, 1950, a license bearing serial number A42837 was duly issued to the Petitioner by the Division for the exhibition of the film trilogy "Ways of Love."

9. The issuance of the licenses for "The Miracle" and "Ways of Love" by the Division as aforesaid were administrative determinations that "The Miracle" is not sacrilegious, obscene, indecent, immoral, inhuman or of such character that its exhibition would tend to corrupt morals or incite to crime, and such determination was not arbitrary, unreasonable, unwarranted or unlawful.

10. Thereafter, and in reliance upon the issuance of the said license by the Division, the Petitioner expended considerable sums in preparing for the exhibition of the said film.

11. Thereafter and during the period from December 12, 1950, through December 22, 1950, and from December 29, 1950, to date, "Ways of Love" was exhibited publicly in the motion picture theater known as the Paris Theater, located at 4 West 58th Street, Borough of Manhattan, City of New York, pursuant to an agreement between the owner of said theater and the Petitioner, which agreement provides for

the payment to Petitioner of a stated percentage of the [fol. 9] amounts paid for admission to the Paris Theater during the exhibition of "Ways of Love."

12. The said film trilogy "Ways of Love" met with general public acclaim, and on December 27, 1950, it was designated the best foreign language film of 1950 by the New York Film Critics, an association of the motion picture film critics of all the major newspapers published in the City of New York.

13. Upon information and belief, on or about December 21, 1950, the Director of the Division was requested by one other than the Petitioner to reexamine "The Miracle" and said Director, after reexamining said film, stated that there was nothing objectionable in said film and that the same had been properly licensed.

14. On January 20, 1951, Petitioner was served with an order to show cause before a designated Committee of the Respondents (hereinafter referred to as "the Committee") why the aforesaid licenses issued to "The Miracle" and "Ways of Love" should not be rescinded and cancelled on the ground that "The Miracle" is sacrilegious. A copy of said order to show cause is annexed hereto and made part hereof as Exhibit A.

15. Petitioner appeared specially before the Committee on January 30, 1951, the return date of the aforesaid order to show cause, for the purpose of challenging the jurisdiction of the Board of Regents to revoke the aforementioned licenses, and to conduct any proceedings or hearings for that purpose on the grounds (1) that the Board of Regents has [fol. 10] no power or authority to revoke any license previously issued by the Division where there has been no abuse of the license or charge of wrongdoing on the part of the licensee; and (2) that the Committee was prejudiced in the matter, had predetermined the question of whether or not "The Miracle" is sacrilegious, and was reported in the public press as having announced its predetermination before opportunity was afforded for the submission of and before any evidence had been received by it.

16. On February 5, 1951, and with the consent of the Committee, Joseph Murstyn as an individual submitted to the Committee an affidavit and 82 Exhibits, showing that "The

"Miracle" is ~~not~~ sacrilegious, and that there was a reasonable basis in fact for the aforementioned determinations by the Division that "The Miracle" is not sacrilegious.

17. No oral testimony was given at the aforementioned hearing conducted by the Committee on January 30, 1951, and Petitioner has not been served with and has not received, copies of written evidence, if any, submitted to the Committee to support the charge that "The Miracle" is sacrilegious.

18. Thereafter and on February 16, 1951, Petitioner was notified that the Respondents determined that "The Miracle" is sacrilegious and directed the Respondent Lewis A. Wilson, as Commissioner of Education, to rescind and cancel the aforementioned licenses for the exhibition of "The Miracle" and "Ways of Love," etc. A copy of the findings and order are annexed hereto as Exhibit B.

[fol. 11] 19. The Petitioner will be immediately and irreparably damaged if the order of cancellation and rescission of the aforesaid licenses is not enjoined forthwith for no motion picture theater in the State of New York may publicly exhibit the said films without licenses for their exhibition.

20. Petitioner is aggrieved by the determination and action of the Respondents as follows:

(a) The Respondents, in determining that "The Miracle" is sacrilegious, exercised a judicial or quasi-judicial function and were without power, authority or right or jurisdiction to make such determination.

(b) The Respondent Lewis A. Wilson, Commissioner of Education of the State of New York, in directing the rescission and cancellation of the licenses issued for the exhibition of "The Miracle" and "Ways of Love" was exercising an administrative function and was without power, authority, right or jurisdiction to issue any such order or to take any such action.

(c) The Respondents, in making the determination that "The Miracle" is sacrilegious, were exercising a judicial or quasi-judicial function and had no jurisdiction of the subject matter in the absence of any charge that there had been an abuse of the license for the exhibition of "The Miracle".

and "Ways of Love," and in the absence of any charge of wrongdoing on the part of the licensee.

(d) The aforementioned hearings and proceedings conducted by the Committee were not conducted pursuant to [fol. 12] any rule or regulation governing the conduct of such hearings or proceedings, and were unauthorized and improper.

(e) The actions taken by the Respondents in determining that "The Miracle" is sacrilegious and issuing the order annexed hereto as Exhibit C are unjust, arbitrary, unreasonable and unwarranted, and unconstitutional and said actions deprive Petitioner of its property rights in the aforesaid licenses without due process of law.

(f) The Respondents in determining that "The Miracle" is sacrilegious and issuing the order annexed hereto as Exhibit C acted in violation of law and the First, Fifth and Fourteenth Amendments of the Constitution of the United States and in violation of the Constitution of the State of New York.

(g) There was no competent proof of the facts necessary to be proved in order to warrant or authorize the determination of the Respondents that "The Miracle" is sacrilegious.

(h) There was no competent proof of the facts necessary to justify or warrant review and reversal by the Respondents of the initial determinations of the Division that "The Miracle" is not in fact sacrilegious.

Wherefore, Petitioner respectfully prays for a review under Article 78 of the Civil Practice Act of the determination and order of the Respondents rescinding and cancelling the licenses issued for the exhibition of the films "The Miracle" and "Ways of Love"; and that an order be made requiring the Respondents to file their answer herein, and [fol. 13] to make and file a complete return before the Appellate Division of the Supreme Court, for the Third Judicial Department, to the end that said Court on such review may annul the determination and order of the Respondents, with costs and disbursements to the Petitioner, and that Petitioner have such other, further and different relief as to the Court may seem just and proper.

No previous application for the relief sought herein has been made, except that in an action for a Declaratory Judg-

ment brought by Petitioner against the Respondents application was made for an order enjoining the Respondents from revoking, cancelling or rescinding the license issued for the exhibition of "Ways of Love" and from conducting any hearings or proceedings for that purpose; and said application was denied for the reason that it was prematurely made.

Application is made herein for an order to show cause for the reason that Petitioner seeks an order enjoining the enforcement of the order attached as Exhibit C pending the hearing of this application.

Dated, New York, February 16, 1951.

Joseph Burstyn, Inc., Petitioner, by Samuel E. Aronowitz, Attorney.

[fol. 14] *Duly sworn to by Samuel E. Aronowitz. Jurat omitted in printing.*

[fol. 15]

### EXHIBIT A TO PETITION

THE UNIVERSITY OF THE STATE OF NEW YORK

The State Department of Education

Before the Commissioner

In the Matter of the Proceedings for the Rescinding and Cancellation of the License Dated November 30, 1950, Issued to JOSEPH BURSTYN, Inc., for the Motion Picture Entitled "Ways of Love".

It appearing that at a meeting of the Board of Regents of the University of the State of New York held in the City of Albany on the 19th day of January, 1951, the following resolution was adopted:

"Notice shall be given forthwith to Lippert Films, Inc., licensee of the motion picture entitled 'Il Miracolo' under license dated March 2, 1949, and to Joseph Burstyn, Inc., licensee of the motion picture entitled 'Ways of Love' under license dated November 30, 1950, to show cause why each of such licenses should not be rescinded."

and cancelled on the ground that said pictures are and each of them is sacrilegious, the latter thereof as to that part of said Trilogy entitled 'The Miracle' at a hearing to be held before a Committee of the Board of [fol. 16] Regents consisting as follows: Chancellor Emeritus Wallin, Chairman, Regent Brosnan and Regent Holtzman, on January 30, 1951, at 3:00 P. M. at the Association of the Bar of the City of New York, 42 W. 44th Street, New York, N. Y.

Such hearing will be restricted to the submission of affidavits and oral arguments and a brief by either or both of said licensees.

Any person or organization may mail or send a brief in this matter to the Chairman of the Committee at 30 S. Broadway, Yonkers 2, New York, prior to the hearing or deliver the brief at the hearing. It is requested that five copies of each brief be filed."

Now, Therefore, pursuant to the authority conferred upon me under the provisions of the Education Law, and by direction of the Board of Regents,

It is hereby ordered that Joseph Burstyn, Inc., as licensee of the motion picture entitled "Ways of Love" show cause at a hearing before a committee of the Board of Regents consisting of William J. Wallin, Chancellor Emeritus, Chairman, John F. Brosnan and Jacob L. Holtzman, on January 30, 1951, at 3 P. M. at the Association of the Bar, 42 West 44th Street, New York City, why said license should not be rescinded and cancelled on the ground that said picture is sacrilegious.

In witness whereof, I, Lewis A. Wilson, Commissioner of Education of the State of New York, for and on behalf of [fol. 17] the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 19th day of January, 1951.

(Sign) Lewis A. Wilson, Commissioner of Education. (Seal)

**EXHIBIT B TO PETITION****For Immediate Release****From the New York State Education Department****February 16, 1951.****Report of the Committee of the Whole**

All members of the Board of Regents present at this meeting, and consisting of a majority of the entire Board, and a quorum thereof, sitting as a Committee of the Whole, having considered the report of the Committee on "The Miracle" and the affidavits, briefs and other documents filed therewith and all of such members of the Board of Regents having viewed such motion picture, now, after full discussion and deliberation, unanimously find and report:

That said motion picture, "The Miracle" is sacrilegious and not entitled to be licensed under the provisions of Section 122 of the Education Law and, therefore, it becomes the duty of this Board to rescind and cancel the licenses of this [fol. 18] picture heretofore issued by the Motion Picture Division of the Department of Education.

Under the laws of our State, no picture (other than some specifically exempted by statute) may be shown unless it first has been licensed and the law expressly forbids the licensing of any picture that is, in whole or in part, sacrilegious. After viewing this picture, we have no doubt that it falls in the category condemned by law.

In this country where we enjoy the priceless heritage of religious freedom, the law recognizes that men and women of all faiths respect the religious beliefs held by others. The mockery or profaning of these beliefs that are sacred to any portion of our citizenship is abhorrent to the laws of this great State. To millions of our people the Bible has been held sacred and by them taught, read, studied and held in reverence and respect. Generation after generation have been influenced by its teachings. This picture takes the concept so sacred to them set forth in both the Protestant and Catholic versions of the Bible (St. Matthew, King James and Douay Versions, Chapter I, verses 18-25) and associates it with drunkenness, seduction, mockery and lewdness.

As to our power and authority to rescind the licenses, we unanimously adopted and approve the report of our Committee. We recognize that when the Legislature in 1927 placed the Motion Picture Division in the Department of Education, it placed upon us, as the constitutional head of that Department, the responsibility for its proper enforcement. The Regents neither sought nor welcomed such power of censorship. However, in this case, we have a clear and [fol. 19] compelling duty under the law to carry out our constitutional responsibility.

Therefore, the license issued by the Motion Picture Division on March 1, 1949, to Lopert Films, Inc. for the motion picture in the Italian language entitled "Il Miracolo" and the license issued on November 30, 1950, to Joseph Burstyn, Inc. for the Trilogy of films carrying the title "Ways of Love," which included the motion picture "The Miracle" should in all respects be canceled and rescinded. An application may be made to the Motion Picture Division for a license of so much of the Trilogy, "Ways of Love," as does not include the motion picture, "The Miracle."

Now, upon motion of the Vice Chancellor, it was unanimously

**Resolved**, that the motion picture "The Miracle" is a sacrilegious motion picture, not entitled to a license under the law; and it is.

**Further Resolved**, that the license issued by the Motion Picture Division on March 1, 1949 to Lopert Films, Inc. for the motion picture "Il Miracolo" be and the same hereby is canceled and rescinded and that the license issued on November 30, 1950 to Joseph Burstyn, Inc. for the Trilogy, "Ways of Love," which included the motion picture "The Miracle" be and the same hereby, likewise is canceled and rescinded.

An application may be made to the Motion Picture Division for the licensing of so much of the Trilogy, "Ways of Love" as does not include "The Miracle."

[fol. 20] IN SUPREME COURT OF NEW YORK

SUPPORTING AFFIDAVIT OF JOSEPH BURSTYN—February 14,  
1951

STATE OF NEW YORK,

County of New York, ss:

Joseph Burstyn, being duly sworn, deposes and says:

1. I am the President of the above named Petitioner, and make this affidavit in support of an application for a temporary injunction, restraining the Respondents from proceeding to revoke, rescind or cancel the licenses issued by the Motion Picture Division of the Department of Education for the films entitled "Il Miracolo" and "Ways of Love." The motion for an injunction is made on the grounds: (a) The Respondents have no power, authority or right to rescind, revoke or cancel the licenses; (b) even if such power existed, there is no justification for its exercise; and (c) unless the temporary injunction is granted Petitioner will suffer immediate and irrevocable damage.

2. On March 2, 1949, a license, bearing serial number TA51033, was duly issued by the Motion Picture Division of the Department of Education (hereinafter referred to as the Division) to Lopert Films, Inc., a New York Corporation, for the exhibition of a motion picture film with Italian dialogue, entitled "Il Miracolo" (hereinafter referred to under the English translation of that title, namely, [fol. 21] "The Miracle"). On behalf of the Petitioner, I purchased from Lopert Films, Inc., the exclusive right to distribute and lease "The Miracle" for exhibition throughout the United States and its territories, for a limited period. I also purchased for Petitioner the exclusive right to distribute and lease the French language motion picture films entitled "Jofroi" and "A Day in the Country" for exhibition throughout the United States and its territories, and then combined the said films with "The Miracle" as a film trilogy under the title "Ways of Love." On November 30, 1950, a license bearing serial number A42837 was duly issued to the Petitioner by the Division for the exhibition of the film trilogy "Ways of Love."

3. In reliance upon the issuance of the aforesaid licenses by the Division, the Petitioner expended considerable sums

in preparing for the exhibition of the said film, for the purposes of promotion and advertising in New York City. Thereafter and during the period from December 12, 1950, through December 22, 1950, and from December 29, 1950, to date, "Ways of Love" was exhibited publicly in the motion picture theater known as the Paris Theater, located at 4 West 58th Street, Borough of Manhattan, City of New York, pursuant to an agreement between the owner of said theater and the Petitioner, which agreement provides for the payment to Petitioner of a stated percentage of the amounts paid for admission to the Paris Theater during the exhibition of "Ways of Love."

4. "Ways of Love" met with general public acclaim, and [fol. 22] on December 27, 1950, it was designated the best foreign language film in 1950 by the New York Film Critics, an association of the motion picture film critics of all the major newspapers published in the City of New York.

5. Upon information and belief, on or about December 21, 1950, the Director of the Division was requested by one other than the Petitioner to re-examine "The Miracle" and said Director, after re-examining said film, stated that there was nothing objectionable in said film and that the same had been properly licensed.

On January 20, 1951, Petitioner was served with an order to show cause before a designated Committee of the Respondents why the aforesaid licenses issued to "The Miracle" and "Ways of Love" should not be rescinded and cancelled on the ground that "The Miracle" is sacrilegious. Petitioner appeared specially before the aforementioned Committee of the Regents on January 30, 1951, the return date of the aforesaid order to show cause, for the purpose of challenging the jurisdiction of the Board of Regents to revoke the aforementioned licenses. However, with the consent of the Committee, I submitted an affidavit with 82 Exhibits showing that the film is not sacrilegious. I am advised that the affidavit and exhibits will be returned to this Court by Respondents.

(A) *The Respondents have no power, authority or right to rescind or cancel the licenses.*

7. I am informed by my attorneys that the Respondents have no power or authority to rescind or cancel the licenses. [fol. 23] The Regents and the Commissioner of Education have only such powers as are conferred by legislative enactment and the Constitution of the State of New York. My attorneys have advised me that there is no statute or law of any kind authorizing the revocation of a motion picture license by the Respondents. Charles A. Brind, Jr., counsel for the Board of Regents, in a statement made when the aforementioned order to show cause was issued, said, "The law says nothing on the Regent's power to review when a license has been granted." (Report of Douglas Dale in the New York Times, January 20, 1951.)

8. The power to censor is alien to our traditions and our law. The Legislature, in enacting the Education Law of the State of New York, created a complete self-contained statutory system for the regulation of motion pictures in the State of New York and invested the Division with certain limited powers to censor motion picture films. The power to censor cannot be extended beyond the power embodied in the statute or extended to or appropriated by the Respondents by any other persons or any other body without specific legislative authorization—which concededly does not exist.

9. My attorneys have advised me further that the proposed action by the Respondents is unprecedented and there is no record of any such prior proceeding to rescind a film license. That also is confirmed in Mr. Brind's press release. (The source of my information is the report of Gordon Allison, published in the New York Herald Tribune January 20, 1951). The fact that Respondents' action is unprecedented and the fact that there is no statutory authority for the taking [fol. 24] of such action at least raises doubt as to whether or not the power to take such action exists. Jacob L. Holtzman, a Regent and one of the Respondents in this action, and himself an attorney, stated to the press on January 21, 1951, "A legal question exists as to whether or not the Board of Regents can revoke the license of a film once it

has been granted by the Motion Picture Division." He later characterized that question as being "wide open."

10. From the foregoing it would appear that there is a question even in the minds of the Respondents, or some of them, with respect to their right and power to rescind the licenses. Despite that doubt, the Respondents are now attempting to exercise the authority to revoke the license of "The Miracle" and "Ways of Love."

*(B) Assuming for the sake of argument, that Respondents have the power to rescind the Licenses issued for "Ways of Love" and "The Miracle," the proposed exercise of that power is unwarranted and improper.*

11. "The Miracle" is and was intended to be the story of the abuse of a deep and simple faith. In twice licensing the film, the Division had to make and did make a determination that it was *not* sacrilegious. In attempting to revoke the license, the Respondents now assert that they consider it sacrilegious. Whatever the Respondents' individual views may be, they cannot deny that there is considerable justification for the opinion that the film is not a mockery of religious faith. The film was publicly exhibited in Rome, [fol. 25] where religious censorship exists, and it was not condemned. It was entered in the Venice Film Festival of 1948 without objection from the Vatican's representatives on the screening committee and on the Jury. Also, according to the report of Life Magazine (issue of January 15, 1951, at p. 69), the Vatican newspaper, "L'Osservatore Romano," in reviewing "The Miracle," made no criticism of it on religious grounds. (In passing, I must add that it would be strange indeed if there were greater religious tolerance in Italy than in the United States where religious freedom is part of our national heritage).

12. As previously stated, "The Miracle" was licensed twice by the Division, once separately, and again as a part of "Ways of Love," and the granting of such license constituted an affirmative finding that the film is not sacrilegious. It was passed by the United States Customs authorities when it was brought to America. It was approved and recommended by the National Board of Review. As appears in my aforementioned affidavit submitted to the Com-

mittee, Protestant ministers, and eminent authors, playwrights, educators, editors, publishers, radio commentators, artists, business executives, attorneys and economists, of the Roman Catholic, Protestant and Jewish faiths, have indicated that they do not consider the film sacrilegious. Film critics of all faiths also found "The Miracle" a devout and pious film.

13. In such circumstances, the finding of the administrative body which has special knowledge in the field, and which is charged with the duty of making such determinations, [fol. 26] may not be overruled by the Respondents because of a difference of opinion. That there was a reasonable basis for the Division's determination that the film is *not* sacrilegious must be conceded.

*(C) Unless the injunction is granted, Petitioner will suffer immediate and irreparable damage.*

14. Petitioner has expended thousands of dollars to obtain the rights to lease "Ways of Love" and "The Miracle" for exhibition in the United States, and after obtaining a license from the Motion Picture Division of the State of New York on November 30, 1950, and in reliance upon such license, Petitioner expended large additional sums for the purposes of advertising and promotion in the immediate New York area. If the Respondents revoke the license, subsequent reinstatement by the Court will not remedy the damage to the Petitioner. The films cannot be exhibited without a license—or while the license is suspended. The cumulative effect of the advertising, the critics' award and the critics' reviews will have been entirely dissipated. Also, as Petitioner's right to exhibit the film in the United States is limited in time, the time lost while the license is rescinded cannot be regained. Furthermore, the success of the film throughout the United States is largely dependent on the success of the first run in New York City and such run cannot be successful if interrupted. The Petitioner's entire investment and expectation of profit (greatly enhanced by the prize award) is thus jeopardized by the proposed action of the Board of Regents.

[fol. 27] 15. My own reputation, and consequently that of the Petitioner with which I am identified, is being damaged

by the proposed illegal procedure of the Board of Regents. I have been in the business of distributing foreign films for twenty years. I am known in the trade as a distributor of the best and most successful foreign language motion pictures. During the last five years I have distributed five prize-winning films; including "Open City," "Paisan," "The Quiet One" and "Bicycle Thief." If the Respondents should succeed in revoking the license, if only during the short period necessary for an appeal, my reputation as the film's distributor among the producers of films, whose receipts depend upon successful distribution, will be impaired.

In view of the foregoing, the Court is respectfully requested to grant the injunction requested until there can be a determination by a court of competent jurisdiction with respect to the Respondents' power or authority to revoke the licenses for the exhibition of the films.

Joseph Burstyn.

Sworn to before me this 14th day of February, 1951.

Ephraim London, Notary Public, State of New York, No. 31-7589800. Qualified in New York County. Cert. filed with N. Y. Co. Clk & Reg. Commission Expires March 30, 1952.

[fol. 28] IX SUPREME COURT OF NEW YORK, APPELLATE DIVISION—THIRD DEPARTMENT

[Title omitted]

ANSWER—February 26, 1951

The respondents, by their attorney, Charles A. Brind, Jr., answering the petition of the petitioner herein respectfully allege:

First. Upon information and belief admits each and every allegation contained in the paragraphs of the petition numbered "1," "2," "3," "14," "17" and "18."

[fol. 29] Second. Upon information and belief, denies each and every allegation contained in the paragraphs of the petition numbered "9," "13," "19" and "20."

Third. Upon information and belief, admits each and every allegation contained in the paragraph of the petition numbered "4," except alleges that The Motion Picture Division of the Education Department of the State of New York, as such official body, is a division of the State Education Department under the jurisdiction of the Board of Regents of the University of the State of New York.

Fourth. Upon information and belief, denies each and every allegation contained in the paragraph of the petition numbered "5," except admits that on March 2, 1949, a license to exhibit a motion picture film with Italian dialogue, entitled "Il Miracolo," was issued by the Division to Lopert Films, Inc.

Fifth. The respondents answering the petition deny that they have any knowledge or information thereof sufficient to form a belief as to any of the allegations contained in the paragraphs of the petition numbered "6," "7" and "10."

Sixth. Upon information and belief, denies each and every allegation contained in the paragraph of the petition numbered "8," except admits that a license was issued to petitioner for the exhibition of the motion picture trilogy entitled "Ways of Love."

[Vol. 30] Seventh. The respondents answering the petition deny that they have any knowledge or information thereof sufficient to form a belief as to any of the allegations contained in the paragraph of the petition numbered "11," except, upon information and belief, admits that the motion picture trilogy entitled "Ways of Love" was exhibited publicly in the motion picture theatre known as the Paris Theatre, located at 4 West 58th Street, Borough of Manhattan and City of New York.

Eighth. The respondents answering the petition deny that they have any knowledge or information thereof sufficient to form a belief as to any of the allegations contained in the paragraph of the petition numbered "12."

Ninth. Upon information and belief, denies each and every allegation contained in the paragraph of the petition numbered "15," except admits that petitioner appeared specially before the Committee on January 30, 1951.

Tenth. Upon information and belief, denies each and every allegation contained in the paragraph of the petition numbered "16," except admit that among others Joseph

Burstyn, as an individual, submitted to the committee an affidavit and exhibits.

Eleventh. Upon information and belief, denies each and every allegation contained in the petition heretofore not specifically admitted or denied.

[fol. 31]. Further answering the petition and as a first separate and completed defense thereto, the respondents allege:

Twelfth. That the issuance of the licenses for the motion picture films entitled "Il Miracolo" and "Ways of Love," including "The Miracle," by the Division, was illegal.

Further answering the petition and as a second separate and completed defense thereto, the respondents allege:

Thirteenth. That the said film entitled "Il Miracolo" or "The Miracle" is sacrilegious. That there are millions of citizens in the State of New York to whom it is a matter of sacred religious belief and of truth related in the Holy Gospels that Jesus Christ is the son of God, born of the Virgin Mary, who is referred to as the Blessed Virgin; that she was married to St. Joseph; that she conceived Jesus through direct intervention of God, the Holy Ghost, and that she remained, before and after conception, a Virgin. That a description, in summary, of the said motion picture, "The Miracle," is as follows:

It tells the story of an unbalanced peasant girl who meets a stranger whom she thinks is St. Joseph. He is costumed in a manner similar to the traditional images of the Saint. He is bearded and wears garments such as were used in the Holy Land in the time of Christ.

This stranger makes the girl drunk with wine and in a most indecent manner seduces her. As a result she [fol. 32] conceives a child. Because of her drunken condition she believes conception was accomplished without carnal relations. Her belief is told to fellow townspeople who, while singing hymns to Mary, stage a mock procession in her honor. The girl is dressed in clothes caricaturing those worn in church processions honoring the Virgin Mary. Flowers are strewn in the girl's path, hymns are sung, and an old wash basin is

placed on her head to resemble a crown. The child she is carrying is addressed by the girl as "My God." The film concludes with a realistic and indecent portrayal of labor pains such as to have a most offensive effect and the birth of the child in a church.

Further answering the petition and as a third separate and completed defense thereto, the respondents allege:

Fourteenth. That the respondents, John P. Myers, William J. Wallin, William Leland Thompson, George Hopkins Bond, W. Kingsland Macy, Edward R. Eastman, Welles V. Moot, Caroline Werner Gannett, Roger W. Straus, Dominick F. Maurillo, John F. Brosnan, and Jacob L. Holtzmann, as Regents of the University of the State of New York, are vested, pursuant to article 5, section 4 and article 11, section 2 of the Constitution of the State of New York, and part 2 of article 3 of the Education Law, with the duty of licensing motion picture films and that pursuant to such duty, and [fol. 33] authority said respondents are vested with the power, authority and jurisdiction to make the determination herein complained of.

Fifteenth. That respondent, Lewis A. Wilson, is the Commissioner of Education of the State of New York and in directing the cancellation of the license issued for the exhibition of "The Miracle" and "Ways of Love" was properly carrying out lawful order of the Board of Regents of the University of the State of New York.

Further answering the petition and as a fourth separate and completed defense thereto, the respondents allege:

Sixteenth. The hearing and proceedings, in this matter, were legally held pursuant to Section 206 of the Education Law.

Seventeenth. Returned herewith and made a part hereof are the following exhibits:

Special Term Exhibit 1. Report of the committee of the whole by Vice Chancellor Eastman.

Special Term Exhibit 2. Order to show cause, dated January 19, 1951, issued by the Commissioner of Education, directed to Joseph Burstyn, Inc.

Special Term Exhibit 3. Order to show cause, dated January 19, 1951, issued by the Commissioner of Education, directed to Lopert Films, Inc.

Special Term Exhibit 4. Transcript of hearing at the Association of the Bar, at the City of New York, held on January 30, 1951.

[fol. 34] Special Term Exhibit 5. Statement of John C. Farber, Esq., counsel for Joseph Burstyn, Inc., which was submitted in writing at the hearing on January 30, 1951.

Special Term Exhibit 6. Affidavit of Joseph Burstyn, verified February 2, 1951, containing 78 exhibits as follows:

Exhibit 1. Statement by number of the Italian Ministry, dated December 30, 1950.

Exhibit 2. Statement of the President of the Italian Motion Picture Industry, dated December 30, 1950.

Exhibit 3. Statement by Director of the Venice Film Festival, dated December 30, 1950.

Exhibit 4. Article from Life Magazine.

Exhibit 5. National Board of Review Weekly Guide for week ending December 16, 1950.

Exhibit 6. Article from "The Churchman," dated February 1, 1951.

Exhibit 7. Letter from John Dillenberger, dated January 29, 1951.

Exhibit 8. Letter from Frederick T. Schumacher, dated January 29, 1951.

Exhibit 9. Letter from Harold C. DeWindt, dated January 25, 1951.

Exhibit 10. Affidavit of Lewis Knester, verified January 26, 1951.

[fol. 35] Exhibit 11. Letter from Norman R. Farnum, Jr., dated January 25, 1951.

Exhibit 12. Letter from W. J. Beeners, dated January 26, 1951.

Exhibit 13. Letter from Albert J. Penner, dated January 25, 1951.

Exhibit 14. Petition from 10 clergymen to the Board of Regents, dated January 16, 1951.

Exhibit 15. Letter from L. Humphrey Walz, dated January 25, 1951.

Exhibit 16. Letter from Kenneth D. Barringer, dated January 26, 1951.

Exhibit 17. Letter from William H. Stevens, Jr., dated January 26, 1951.

Exhibit 18. Letter from John E. Smith, dated January 31, 1951.

Exhibit 19. Letter from Roland Emerson Haynes, dated January 26, 1951.

Exhibit 20. Letter from Merrill E. Bush, dated January 26, 1951.

Exhibit 21. Letter from Marian Schneider, dated January 31, 1951.

Exhibit 22. Letter from Samuel L. Terrien, dated January 31, 1951.

Exhibit 23. Letter from Paul Lehmann, dated January 26, 1951.

Exhibit 24. Letter from Mrs. Edward W. Pfluke, Jr., dated January 26, 1951.

Exhibit 25. Letter from Edward Darling, dated January 26, 1951.

[fol. 36] Exhibit 26. Letter from Rev. Solon D. Morgan, dated February 1, 1951, and statement of the Liberal Ministers' Club of New York, undated.

Exhibit 27. Letter from Laurence B. Holland, dated January 27, 1950.

Exhibit 28. Letter from Edward James Smythe, dated January 8th, 1951.

Exhibit 29. Letter from Gerald F. Weary, dated January 26, 1951.

Exhibit 30. Letter from Henry A. Culbertson, dated January 25, 1951.

Exhibit 31. Letter from Hugh Thomson Kerr, Jr., dated January 26, 1951.

Exhibit 32. Letter from H. H. Wilson, dated January 22, 1951.

Exhibit 33. Letter from Maurice A. Hall, dated January 25, 1951.

Exhibit 34. Letter from W. T. Stace, dated January 25, 1951.

Exhibit 35. Affidavit of Isidor B. Hoffman, verified February 1, 1951.

Exhibit 36. Letter from Sabert Basescu, dated January 24, 1951.

Exhibit 37. Letter from W. Freeman Galpin, dated January 27, 1951.

Exhibit 38. Letter from Georges A. Barrois, dated January 25, 1951.

Exhibit 39. Statement by H. W. Janson, dated December 28, 1950.

[fol. 37] Exhibit 40. Letter from John K. Sefcik, dated January 25, 1951.

Exhibit 41. Letter from Edward W. Mills, dated January 26, 1951.

Exhibit 42. Letter from John V. Watson, dated January 23, 1951.

Exhibit 43. Letter from Frank M. Dunn, Jr., dated January 26, 1951.

Exhibit 44. Statement by Edith Cobb, dated December 28, 1950.

Exhibit 45. Letter from Mary M. Bigelow, dated January 26, 1951.

Exhibit 46. Statement by Henry A. Singer dated December 30, 1950.

Exhibit 47. Letter from Bessie Jones, dated January 26, 1951.

Exhibit 48. Letter from Mrs. Harold B. Brinig, dated January 28, 1951.

Exhibit 49. Letter from Alfred S. Cole, dated January 26, 1951.

Exhibit 50. Letter from Rev. Byron O. Waterman, dated January 9, 1951.

Exhibit 51. Letter from Ernest F. W. Wildermuth, dated January 20th, 1951.

Exhibit 52. Letter from Gay Campbell, undated.

Exhibit 53-a. Article from New York Herald Tribune, dated January 30, 1951.

Exhibit 53-b. Letter from Kathleen C. Rogon, dated January 27, 1950.

[fol. 38] Exhibit 53-c. Letter from Jeremiah Y. Canoll, dated December 27, 1950.

Exhibit 53-d. Letter from Tiffany Thayer, dated December 30, 1950.

Exhibit 53-e. Letter from Bernard J. Bamberger, dated February 1, 1951.

Exhibit 54. Article from Magazine of Art, dated February, 1951.

Exhibit 55. Statement by Karl M. Chwadowsky, dated January 15, 1951.

Exhibit 56. Text of Radio Broadcast by Harry Brager made January 28, 1951.

Exhibit 57. Text of Radio Broadcast by Bill Leonard made December 28, 1950.

Exhibit 58. Statement by J. Spencer Kennard, Jr., dated January, 29, 1951.

Exhibit 59. Statement by Donald Harrington, undated.

Exhibit 60. Article from the New Republic, dated January 1, 1951.

Exhibit 61. Article from The Nation.

Exhibit 62. Article from the N. Y. Times, dated February 1, 1951.

Exhibit 63. Article from Tomorrow.

Exhibit 64. Article from Wilmington, Del. News, dated January 23, 1951.

Exhibit 65. Article from N. Y. Times, dated January 2, 1951.

[fol. 39] Exhibit 66. Article from New York Post, January 16, 1951.

Exhibit 67. Article from Reading, Pa., Eagle; January 4, 1951.

Exhibit 68. Article from Daily News, December 13, 1950.

Exhibit 69. Two articles from N. Y. Times, January 29, 1951.

Exhibit 70. Two articles from New York Post, December 27, 1950.

Exhibit 71. Newspaper article.

Exhibit 72. Newspaper article.

Exhibit 73. Three newspaper articles.

Exhibit 74. Newspaper article, New York Post, December 26, 1950.

Exhibit 75. Article from Washington, D. C., Post, December 31, 1950.

Exhibit 76. Article from Boston Herald, January 2, 1951.

Exhibit 77. Article from New York Times, January 14, 1951.

Exhibit 78. Article from New York Times, January 22, 1951.

Special Term Exhibit 7. Report of the Committee on The Miracle, dated February 15, 1951.

Special Term Exhibit 8. Report of the Committee of the Whole, dated February 16, 1951.

Special Term Exhibit 9. Letter from Ephraim S. London to Charles A. Brind, Jr., dated January 22, 1951, and [fol. 40] answer to Ephraim S. London from Charles A. Brind, Jr., dated January 23, 1951.

Special Term Exhibit 10. Memorandum decision by MacAffer, J., Supreme Court, Albany County, Special Term February 16, 1951.

Special Term Exhibit 11. Order signed by Justice MacAffer, dated February 20, 1951.

Special Term Exhibit 12. Italian dialogue, English translation and English sub-titles.

#### *Objections in Point of Law*

1. The Petition herein does not state facts sufficient to constitute a cause of action.

WHEREFORE, respondents pray for an order dismissing the petition herein on the merits, together with costs and disbursements, and for such other and further relief as to this Court may seem just and proper.

CHARLES A. BRIND, Jr.,  
Attorney for Respondents,  
Office and P. O. Address,  
State Education Building,  
Albany, New York.

[fol. 41] *Duly sworn to by Charles A. Brind, Jr., jurat omitted in printing.*

[fol. 42] SPECIAL TERM EXHIBIT 1 TO ANSWER

The Chancellor stated that he had appointed a committee consisting of Chancellor Emeritus Wallin, Regent Brosnan and Regent Holtzmann to review the motion picture known as "The Miracle." A license for the exhibition of this picture then entitled "Il Miracolo" was issued on

March 2, 1949, to Lopert Films, Inc. Thereafter on November 30, 1950, a license to exhibit a motion picture consisting of a Trilogy entitled "Ways of Love" was issued to Joseph Burstyn, Inc. Included in this Trilogy is the motion picture "The Miracle." He also announced that the committee was ready to report and the matter was referred to the Committee of the Whole.

*Report of Committee of the Whole  
By Vice Chancellor Eastman,*

The committee of the Regents appointed by the Chancellor stated that it had reviewed the picture "The Miracle" at the offices of the Division of Motion Pictures in New York City on January 15, 1951 and that in the unanimous judgment of the committee the picture is sacrilegious.

After discussion the Committee of the Whole recommended and I move the adoption of the following resolution:

Notice shall be given forthwith to Lopert Films, Inc., licensee of the motion picture entitled "Il Miracolo" under license dated March 2, 1949 and to Josephs Burstyn, Inc., licensee of the motion picture entitled "Ways of Love" under license dated November 30, 1950 to show cause why each of such licenses should not be rescinded and cancelled on [fol. 43] the ground that said pictures are and each of them is sacrilegious, the latter thereof as to that part of said Trilogy entitled "The Miracle" at a hearing to be held before a Committee of the Board of Regents consisting as follows: Chancellor Emeritus Wallin, Chairman, Regent Brosnan and Regent Holtzmann on January 30, 1951 at 3:00 P. M. at the Association of the Bar of the City of New York, 42 W. 44th Street, New York, N. Y.

Such hearing will be restricted to the submission of affidavits and oral arguments and a brief by either or both of said licensees.

Any person or organization may mail or send a brief in this matter to the Chairman of the Committee at 30 S. Broadway, Yonkers 2, New York, prior to the hearing or deliver the brief at the hearing. It is requested that five copies of each brief be filed.

[fol. 44] SPECIAL TERM EXHIBIT 2 TO ANSWER

Order to Show Cause.

(Seal)

THE UNIVERSITY OF THE STATE OF  
NEW YORK.

THE STATE DEPARTMENT OF EDUCATION

Before the Commissioner

In the Matter of The Proceeding for the rescinding and cancellation of the license dated November 30, 1950, issued to JOSEPH BURSTYN, Inc., for the motion picture entitled "Ways of Love."

It appearing that at a meeting of the Board of Regents of the University of the State of New York held in the City of Albany on the 19th day of January, 1951; the following resolution was adopted:

"Notice shall be given forthwith to Lopert Films, Inc., licensee of the motion picture entitled 'Il Miracolo' under license dated March 2, 1949 and to Joseph Burstyn, Inc., licensee of the motion picture entitled 'Ways of Love' under license dated November 30, 1950, to show cause why each of such licenses should not be rescinded and cancelled on the ground that [fol. 45], said pictures are and each of them is sacrilegious, the latter thereof as to that part of said Trilogy entitled 'The Miracle' at a hearing to be held before a Committee of the Board of Regents consisting as follows: Chancellor Emeritus Wallin, Chairman, Regent Brosnan and Regent Holtzmann, on January 30, 1951, at 3:00 P. M. at the Association of the Bar of the City of New York, 42 W. 44th Street, New York, N. Y.

"Such hearing will be restricted to the submission of affidavits and oral arguments and a brief by either or both of said licensees.

"Any person or organization may mail or send a brief in this matter to the Chairman of the Commit-

tee at 30 S. Broadway, Yonkers 2, New York, prior to the hearing or deliver the brief at the hearing. It is requested that five copies of each brief be filed."

Now, THEREFORE, pursuant to the authority conferred upon me under the provisions of the Education Law, and by direction of the Board of Regents,

IT IS HEREBY ORDERED, that Joseph Burstyn, Inc., as Licensee of the motion picture entitled "Ways of Love" show cause at a hearing before a committee of the Board of Regents consisting of William J. Wallin, Chancellor Emeritus, Chairman, John F. Brosnan and Jacob L. Holtzmann, on January 30, 1951, at 3 P. M. at the Association of the Bar, 42 West 44th Street, New York City, why said license [fol. 46] should not be rescinded and cancelled on the ground that said picture is sacrilegious.

IN WITNESS WHEREOF, I, Lewis A. Wilson, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 19th day of January, 1951.

LEWIS A. WILSON  
(Seal) Commissioner of Education

Copy

[fol. 47] SPECIAL TERM EXHIBIT 3 TO ANSWER

*Order to Show Cause*

(Seal)

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE DEPARTMENT OF EDUCATION

Before the Commissioner

In the Matter of the Proceeding for the rescinding and cancellation of the license dated March 2, 1949, issued to LOPERT FILMS, INC., for the motion picture entitled "Il Miracolo."

It appearing that at a meeting of the Board of Regents of the University of the State of New York held in the City

of Albany on the 19th day of January, 1951, the following resolution was adopted:

"Notice shall be given forthwith to Lopert Films, Inc., licensee of the motion picture entitled 'Il Miracolo' under license dated March 2, 1949 and to Joseph Burstyn, Inc., licensee of the motion picture entitled 'Ways of Love' under license dated November 30, 1950 to show cause why each of such licenses should not be rescinded and cancelled on the ground that said [fol. 48] pictures are and each of them is sacrilegious, the latter thereof as to that part of said Trilogy entitled 'The Miracle' at a hearing to be held before a Committee of the Board of Regents consisting as follows: Chancellor Emeritus Wallin, Chairman, Regent Brosnan and Regent Holtzmann, on January 30, 1951 at 3:00 P. M. at the Association of the Bar of the City of New York, 42 W. 44th Street, New York, N. Y.

"Such hearing will be restricted to the submission of affidavits and oral arguments and a brief by either or both of said licensees.

"Any person or organization may mail or send a brief in this matter to the Chairman of the Committee at 30 S. Broadway, Yonkers 2, New York, prior to the hearing or deliver the brief at the hearing. It is requested that five copies of each brief be filed."

Now, THEREFORE, pursuant to the authority conferred upon me under the provisions of the Education Law, and by direction of the Board of Regents,

IT IS HEREBY ORDERED that Lopert Films, Inc., a licensee of the motion picture entitled "Il Miracolo" show cause at a hearing before a committee of the Board of Regents consisting of William J. Wallin, Chancellor Emeritus, Chairman, John F. Brosnan and Jacob L. Holtzmann, on January 30, 1951, at 3 P. M. at the Association of the Bar, 42 West [fol. 49] 44th Street, New York City, why said license should not be rescinded and cancelled on the ground that said picture is sacrilegious.

IN WITNESS WHEREOF, I, Lewis A. Wilson, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my

hand and affix the seal of the State Education Department,  
at the City of Albany, this 19th day of January, 1951.

(Seal)

(S) LEWIS A. WILSON  
Commissioner of Education  
Copy

[fol. 50] SPECIAL TERM EXHIBIT 4 TO ANSWER

*Minutes of a Meeting of a Sub-Committee of the Board of Regents of the State of New York, Held at the Building of the Association of the Bar of the City of New York on January 30, 1951, at 3 P. M.*

Present:

Chancellor Emeritus William J. Wallin, Chairman,  
Regents John F. Brosnan and Jacob L. Holtzman, and  
Charles A. Brind, Jr., Esq.,  
Counsel for the State Education Department.

The Chairman: The hearing is called to order. Counsel for the licensees are invited to take the tables here, if they care to do so. They are set apart for them and other chairs will be provided if they need them. You may push the tables together if you want to confer.

I would announce to counsel that we are a committee appointed to hear and report back to the Board of Regents. We have no other or further power. As we see it, there are two questions to be discussed. One is the power of the Board of Regents to revoke and the second is the factual question, is this picture, "The Miraele," sacrilegious?

There will be nobody heard except the licensees. Other people may file briefs. So far as the licensees and their counsel are concerned, we say that you may appear here specially, if you care to, for the purpose of challenging jurisdiction or otherwise, or inasmuch as we are seeking light on the matter, you may appear generally, and we will [fol. 51] stipulate on the record that all your legal rights are reserved, with the same force and effect as if you had not appeared. If you make that your choice, we shall be glad to hear you.

Mr. John C. Farber: Whom do you wish to hear first?

The Chairman: Either of you.

Mr. Farber: My name is John C. Farber.

The Chairman: Yes. We are making a record, by the way, so the stenographer from time to time may stop you, if you go too fast.

Mr. Farber: I am appearing here specially on behalf of Joseph Burstyn, Inc., the licensee. I have prepared a statement, because I want the record to be just exactly what I have here. I am going to read the statement and then I will be glad to leave it with you.

I am appearing herein specially on behalf of Joseph Burstyn, Inc., and solely for the purposes hereinafter stated. In order that there may be no possible misinterpretation or misquotation of what is here said, I am reading this as a prepared statement.

The Chairman: You will file it, I assume, so you will make sure there is no misquotation.

Mr. Farber: Yes. I will file it.

On behalf of Joseph Burstyn, Inc., and appearing specially for that purpose, I challenge the jurisdiction of this committee and of the Board of Regents to conduct any hearings or further proceedings in this matter looking toward the revocation of the license duly issued to the film trilogy "Ways of Love," of which trilogy one film, "The Miracle," is a component part.

The bases of this challenge are that:

[fol. 52] (1) No power has been granted by the legislature to the Board of Regents to proceed in the manner in which it is now attempting to proceed.

(2) Under such cases as have been decided by the courts of the State of New York, determination has already been made that the Board of Regents is without power or authority to so proceed.

As you gentlemen are undoubtedly advised, an application was made to the Supreme Court in Albany County yesterday to enjoin the holding of this hearing upon the grounds just mentioned and, as you undoubtedly know, the court refused to grant a temporary restraining order. Having been advised only of the result of the determination made by Judge Elsworth by telephone, I am only able

to state what my understanding is of the grounds upon which he refused to grant the injunction. If my understanding is correct, the basis for his refusal to grant an injunction against the holding of this hearing is that the question of whether there is any power in the statute is open to doubt—with which position, of course, I do not agree—but in any event the question may become wholly academic, because the ultimate act of the Board of Regents, against which Joseph Burstyn, Inc., seeks protection—namely, the revocation of the existing license of the film—may never come to pass. Therefore, the court concluded that the application made on behalf of Joseph Burstyn, Inc., for an injunction was tainted with prematurity.

Being convinced that there is no authority in the statute [fol. 53] and that the courts of this state have held that the Board of Regents is without power to proceed in the manner in which it is proceeding, I respectfully move that the committee so hold and that no further action be taken by this committee at this time in this hearing with respect to Joseph Burstyn, Inc.

Is the committee prepared to rule on such motion, and, if so, how does it rule?

The Chairman: We are not prepared to rule, as we are still studying the matter. We have reached no conclusion.

Mr. Farber: Secondly; again appearing specially on behalf of Joseph Burstyn, Inc., and solely for the purpose hereinafter stated, I direct the attention of the committee to the fact that the order dated January 30 directs Joseph Burstyn, Inc., to show cause "why said license" (referring to the license granted to the motion picture entitled "Ways of Love") "should not be rescinded and cancelled on the ground that said picture is sacrilegious." The sole question which the order to show cause directs the committee to consider and make recommendations on is therefore whether the film is sacrilegious.

The order dated January 19, 1951, designates as the committee of the Board of Regents William J. Wallin, Chancellor Emeritus, as Chairman, John F. Bresnan and Jacob L. Holtzmann.

Douglas Dales, staff correspondent for the New York Times, has reported under date line of Albany, January

19, 1951, in the issue of the New York Times published January 20 that:

"The subcommittee viewed the film in New York City Monday. \* \* \* The subcommittee reported its unanimous opinion that the picture was sacrilegious."

[fol. 34] Therefore, it is submitted that this committee has made a pre-judgment of the issue with respect to which it was to receive evidence and, after the receipt and consideration of such evidence, made a determination; moreover, that it has publicly declared its judgment. In these circumstances, again appearing specially for Joseph Burstyn, Inc., and solely for that purpose, I move that this committee disqualify itself to conduct these hearings because of the fact that it has predetermined the issues without the submission of all the evidence.

Are you gentlemen prepared to rule with respect to this motion?

The Chairman: Denied on the ground there has been no predetermination and cannot be. The committee is not clothed with power. It is a committee to hear and report back only.

Mr. Farber: May I say that I anticipated that that would be the ruling, Mr. Chairman, and therefore I said I had prepared this as a prepared statement?

The Chairman: Very well.

Mr. Farber: In the circumstances and upon my advice, Joseph Burstyn, Inc., shall respectfully refuse to participate in the hearing and Joseph Burstyn, Inc., will not introduce any evidence in this hearing for the reasons hereinabove stated, and we are now withdrawing Joseph Burstyn, Inc., from the hearing.

The Chairman: Just a moment will you please Counsel? We think that inasmuch as your legal rights are fully protected by the stipulation, which we have offered to give, you may introduce evidence and submit a brief in the matter. You might at least be helpful in the solution of the [fol. 55] questions by submitting a brief and making an argument. It seems to me that, in view of the situation, it is a very technical position to take on behalf of your client,

if you do not afford us the opportunity to get the results of your studies in written form so that we may consider them.

Mr. Farber: Mr. Chairman, may I say that it is my greatest desire to be of assistance to this committee, to the Board of Regents and to anyone else who is involved in reaching a determination of the issues here involved. I consider that they are basic, that they are vital and that they affect a great many people in a great many directions. The difficulty that I have, very frankly, as I stated to Mr. Brind yesterday in Albany in the argument is this: It must be apparent that any determination which is made here, if we are to resolve the basic question which is involved, would be subject to review in the courts, and my difficulty, frankly, is how do I preserve for the record in an appellate court the position of a special appearance when, in spite of any stipulation on the record, one court, two courts, three courts removed, looking coldly at the record, may say, "Well, he protested that he appeared specially. The people before whom he appeared said he might appear specially, but he didn't; he appeared generally." Now, I realize, Mr. Holtzman, that perhaps it may be—

Mr. Holtzman: I don't follow you. I don't follow your reasoning. I just don't see your argument.

Mr. Farber: I know you don't, but the difficulty is that I [fol. 56] have seen this same thing happen in records on appeal where the courts have so ruled.

The Chairman: Well, we are not going to question it. You are advising your client.

Mr. Farber: I will be very glad if, after further consideration, Mr. Chairman, I am permitted to submit a brief.

The Chairman: How much time do you want?

Mr. Farber: Well, two or three days, perhaps. That is all I need.

The Chairman: We are seeking all the light we can get. Not later than the end of this week, if you see fit to submit a brief, you may do so, and we will receive it.

Mr. Farber: Thank you very much.

Mr. Ephraim London: My name is Ephraim London and I am appearing as counsel for Joseph Burstyn as an individual.

In view of the statement that you just made, I would

like to have a modification of your original decision and ask you to allow me to appear as attorney for Mr. Burstyn as an individual and not connected with the licensee, the corporation Joseph Burstyn, Inc.

The Chairman: He is not a party.

Mr. London: He is not a party, and that is why I asked for a modification.

The Chairman: We cannot allow any appearance except by the licensee. You may file a brief, however, if you care to, as any other person may who is interested in this matter, either financially or otherwise.

Mr. London: If this body is really seeking, and I am certain that it is, whatever evidence we have, whatever evidence we may submit without prejudicing the rights of the [fol. 57] licensee, it will hear me, because I am prepared to submit the evidence.

The Chairman: Wasn't that gentlemen who spoke first the attorney for the licensee?

Mr. London: He is the attorney for the licensee, yes.

The Chairman: And you are not the attorney for the licensee?

Mr. London: I want to make it clear that I am an attorney for the licensee but that I do not appear here as an attorney for the licensee.

The Chairman: We are not hearing people who do not appear for the licensee, but such people, including you and this gentlemen, may file a statement or a brief, if they wish to do so.

Mr. London: In that case, I must except to your decision and say that I regret that that is your decision.

The Chairman: Why do you regret it? So you can't talk? Do you know how many other people would want to talk? We would be here for a week.

Mr. London: Excepting you must realize that the position of the individual is very different from the position of any other person who may want to speak in this case. The individual's reputation is at stake here. It has been questioned, and he wants an opportunity to redeem it and to present the evidence for that purpose.

The Chairman: This is not the forum for that.

Mr. Holtzman: Does he control the corporation, Mr. London?

Mr. London: He does. He is the sole stockholder.

[fol. 58] Mr. Holtzman: If he is the sole stockholder, do you mean that you want him to come in here by one counsel and say, "We refuse to talk with you." We invited him to give us the benefit of his views. This question of jurisdiction is an open one, one that the Regents will have to decide. This committee will have the responsibility of making a recommendation on it or expressing its views on it, and we want just the evidence from Burstyn, Inc. He is called upon here to show cause why we should not take this action, to tell us that and to argue the point and help us reach a decision on this very important question as to the power and the jurisdiction of the Board of Regents. Now, I won't say it was a personal affront, but he took a position which, frankly, I do not understand. We said to him, or rather the Chancellor said, that he is fully protected, that his rights are fully protected, that it will be understood here now that he appears specially and that every right to question the jurisdiction of this committee and of the Regents will be fully recognized on the record, so that anyone here or in any future court can recognize it, but notwithstanding that fact he turned on his heel and walked out.

The Chairman: The rest of us do not feel any affront because he is standing on his legal rights. Let him walk out, if he chooses. I mean that there is no point about that. If your man is the chief stockholder and he is so jealous of his reputation, he can readily arrange that the counsel for the corporation appears and files its evidence and brief.

[fol. 59] Mr. London: Excepting that the point that Mr. Farber was making was precisely this; that no matter what stipulation is made on the record now, there is a possibility that an appellate court may take the position that the discussion of the merits will preclude a later claim that the appearance was special.

The Chairman: We understand that.

Mr. London: And there is justification for that opinion.

The Chairman: Probably so. He thinks so, anyhow, but, if there be, we cannot hear stockholders of the corporation when the corporation takes one position and they seek to establish what you call a personal reputation. No, that cannot be done. We will not hear you, but you may file a

statement or a brief, and ~~inasmuch as you apparently came~~ not prepared to do that, ~~you may have the same time that~~ we gave to the corporation.

Mr. London: May I have until Monday to submit an affidavit and a brief?

The Chairman: All right. Surely.

Mr. London: The Paris Theatre has also requested me to do the same.

The Chairman: We will be glad to get all the papers we can, all the enlightenment we can, on the questions that are raised, both legal and factual. Will you please tell the other counsel he may have the same time?

Mr. London: Yes, sir.

The Chairman: We thank you.

Mr. Peter Ippolito: Is that the last day for everyone to file, so that there will be no question? Is that the deadline for filing?

[fol. 60] The Chairman: That is the day for them to file. There is not a general interest but, as I said, a special interest in this controversy. We must have an end to this. We have enough briefs to tell us everything about it that we should know and how people feel. If there is a special interest involved in the event, we will have to give them that much time. Whom do you represent, sir?

Mr. Ippolito: Well, the point here is that, as a lawyer and as one who has already filed a brief and who would like to know what the deadline will be so that we won't have people coming in here next year and keeping this matter open for a great—

The Chairman: This is the date for two specific people who have now appeared. You have already filed your brief?

Mr. Ippolito: Yes.

Judge Goldstein: I want to say that I have also filed my brief, but since the attorney representing the licensee which the Department of Education, under Section 122, licensed, has seen fit to merely question the jurisdiction of this committee, I believe that as an attorney and as *amicus curiae* and as attorney for the Voluntary Public Defenders' Committee, which I represent, I would like to give this committee the benefit of what I know concerning the law and the facts, which the other attorneys have refused to

give, and in that respect, may it please this committee, I understand that this committee is in search of the verities. It is a question which had come up because of an order to show cause issued by the Board of Regents directed to the licensee, which the Department of Education issued after [fol. 61] viewing the film and did give a license under Section 122 and now issues an order, directed to the licensee, to show cause why the license should not be revoked on the ground that this picture is sacrilegious. I am prepared with evidence.

The Chairman: You got your speech in, anyhow, after I told you we weren't going to permit speeches. I say no, that we have to end it. We have given the public notice that the time to file briefs was at this time. The interested parties may do so. The record will show—and you may convey this, if you will, to our absentee counsel—that the committee here sitting viewed the motion picture "The Miracle" on Monday, the 15th day of January, 1951. The hearing is closed. Any of those present having briefs with them will please leave them at the entrance and the record will be made.

Judge Goldstein: Before you close the hearing, may I put on the record this: that I do not believe that the Department of Education and the subcommittee appointed by the Board of Regents can shut the door in the faces of those who come here to argue in favor of the revocation of this license, which I am now prepared to argue and to give proof and to give evidence quite apart from this committee having viewed the film? Your Honors, you are sitting as judges, and I must state to you gentlemen of the committee that you cannot act both as the judges and those in an evidentiary capacity. Now, there are others here who have viewed it and I have the law, which I would like to submit to you. I would like to submit Section 130, which gives you the right to revoke.

[fol. 62] The Chairman: We are not going to hear argument, Judge. You have filed your brief, as you had a right to do. The resolution of the Regents sets forth this: "Such hearing will be restricted to the submission of affidavits and oral arguments and a brief by either or both of said licensees. Any person or organization may mail or send

a brief in this matter to the chairman of the committee at 30 South Broadway, Yonkers, N. Y., prior to the hearing or deliver the brief at the hearing."

That is the rule under which we are working. There will be a record that no appearance is made on behalf of the original licensee.

Judge Goldstein: I wish to appear as in favor of the revocation of this license, and I give my name, Joseph Goldstein. I am a lawyer, and I am here for the purpose of appearing in favor of revoking this license, and I ask permission to state my grounds. Should this committee refuse to do so, that is very good.

The Chairman: It is denied. Now, you are not going to get past this committee, however many speeches you make, Judge. The rules are laid down for this procedure and we are following them. The hearing is closed.

[fol. 63] · SPECIAL TERM EXHIBIT 5 TO ANSWER

*Statement of John C. Farber, Counsel for Joseph Burstyn, Inc.*

Gentlemen:

I am appearing herein specially on behalf of Joseph Burstyn, Inc. and solely for the purposes hereinafter stated. In order that there may be no possible misinterpretation or misquotation of what is here said, I am reading this as a prepared statement (see p. 3).

On behalf of Joseph Burstyn, Inc. and appearing specially for that purpose, I challenge the jurisdiction of this committee and of the Board of Regents to conduct any hearings or further proceedings in this matter looking toward the revocation of the license duly issued to the film-trilogy "Ways of Love," of which trilogy one-film, "The Miracle," is a component part.

The bases of this challenge are that:

(1) No power has been granted by the legislature to the Board of Regents to proceed in the manner in which it is now attempting to proceed.

(2) Under such cases as have been decided by the courts of the State of New York, determination has

already been made that the Board of Regents is without power or authority to so proceed.

As you gentlemen are undoubtedly advised, an application was made to the Supreme Court in Albany County yesterday to enjoin the holding of this hearing upon the [fol. 64] grounds just mentioned and, as you undoubtedly know, the court refused to grant a temporary restraining order. Having been advised only of the result of the determination made by Judge Elsworth by telephone, I am only able to state what my understanding is of the grounds upon which he refused to grant the injunction. If my understanding is correct, the basis for his refusal to grant an injunction against the holding of this hearing is that the question of whether there is any power in the statute is open to doubt—with which position, of course, I do not agree—but in any event the question may become wholly academic, because the ultimate act of the Board of Regents, against which Joseph Burstyn, Inc. seeks protection—namely, the revocation of the existing license of the film—may never come to pass. Therefore the court concluded that the application made on behalf of Joseph Burstyn, Inc. for an injunction was tainted with prematurity.

Being convinced that there is no authority in the statute and that the courts of this state have held that the Board of Regents is without power to proceed in the manner in which it is proceeding. I respectfully move that the committee so hold and that no further action be taken by this committee at this time in this hearing with respect to Joseph Burstyn, Inc.

Is the committee prepared to rule on such motion, and, if so, how does it rule?

Mr. Farber: Secondly, again appearing specially on behalf of Joseph Burstyn, Inc. and solely for the purpose hereinafter stated, I direct the attention of the committee to the fact that the order dated January 30, directs Joseph Burstyn, Inc. to show cause "why said license" (referring to the license granted to the motion picture entitled "Ways of Love") "should not be rescinded and canceled on the ground that said picture is sacrilegious." The sole question which the order to show cause di-

dicts the committee to consider and make recommendations on is therefore whether the film is sacrilegious.

The order dated January 19, 1951, designates as the committee of the Board of Regents William J. Wallin, Chancellor Emeritus, as Chairman, John F. Brosnan and Jacob L. Holtzmann.

Douglas Dales, staff correspondent for the New York Times, has reported under date line of Albany, January 19, 1951, in the issue of the New York Times published January 20 that:

"The subcommittee viewed the film in New York City Monday. \* \* \* The subcommittee reported its unanimous opinion that the picture was sacrilegious."

Therefore it is submitted that this committee has made a prejudgment of the issue with respect to which it was to receive evidence and, after the receipt and consideration of such evidence, made a determination; moreover, that it has publicly declared its judgment. In these circumstances, again appearing specially for Joseph Burstyn, Inc. and solely for that purpose, I move that this committee disqualify itself to conduct these hearings because of the fact that it has predetermined the issues without the submission of all the evidence.

[fol. 66] SPECIAL TERM EXHIBIT 6 TO ANSWER

*Affidavit of Joseph Burstyn.*THE UNIVERSITY OF THE STATE OF  
NEW YORK.

## THE STATE DEPARTMENT OF EDUCATION

In the Matter of - The Proceeding for the Rescinding and Cancellation of the License dated November 30, 1950, Issued to JOSEPH BURSTYN, INC. for the Motion Picture entitled "Ways of Love."

State of New York,  
County of New York, ss:

JOSEPH BURSTYN, being duly sworn, deposes and says:

1. I am President and sole stockholder of Joseph Burstyn, Inc., licensee of the film Ways of Love. To avoid prejudicing the rights of the corporate licensee, I am making this affidavit as an individual and not on behalf of the corporation. Permission to submit this affidavit and supporting evidence was granted by the Committee appointed by the Board of Regents to conduct hearings in the above matter.

2. My purpose in making this affidavit is to present evidence and material to support the two determinations by [fol. 67] the Motion Picture Division of the Board of Education that The Miracle is not sacrilegious. I am advised by my attorney that the Division's issuance of the licenses for the Miracle as a separate film on March 2, 1949, and for the Miracle as a part of the film trilogy Ways of Love on November 30, 1950, were administrative findings that the picture is in fact not sacrilegious. I am further advised that such determinations by the Division, an administrative body charged with the duty of making such findings, may not be overruled where there is a reasonable basis therefor.

3. The Motion Picture Division was under the supervision of different persons when each of the licenses was issued. When the license for The Miracle was first issued, Ward C. Bowen was the Director of the Division. In a

recent letter sent to the Paris Theater where the picture is being exhibited, Mr. Bowen stated that his reviewers did not find any serious objection to the film when they saw it in 1949. I believe Mr. Bowen saw the film himself and found no reason for denial of the license. Dr. Hugh Flick was Director of the Division when *The Miracle* was licensed in November, 1950, as part of *Ways of Love*. On December 22, 1950, eleven days after the first showing of the film, I was advised by Dr. Flick that he had been requested to re-examine *The Miracle*, and that after a re-examination, he found that the picture was not objectionable. The administrative findings in this case were, therefore, not the result of perfunctory review, but the carefully considered and reconsidered decisions of different eminently qualified experts in the field.

[fol. 68] 4. Certainly the text of the film is not sacrilegious. It is the story of a simple-minded peasant who is taken advantage of by a wayfarer she believes to be St. Joseph. In her simplicity she imagines that the child she bears was miraculously conceived. Those who condemn the picture (and I take comfort in the knowledge that the great majority of them have not seen it) interpret it as a parable and a mockery of the divine birth of Christ. The sacrilege then is in that interpretation and not in the story, or in the presentation. The picture is and was intended to be the story of the abuse of a deep and simple faith. That was the intent of the writer, the producer, director and the professional cast, all of whom are devout Roman Catholics. That was my understanding when I arranged for its distribution. That obviously was also the opinion of the censors who licensed the film.

5. As previously stated, so long as there is reasonable justification for the determination of the Division that the film is not sacrilegious, that determination may not be reversed. That there is considerable justification for the finding that the film is not sacrilegious is confirmed by the following: The film was publicly exhibited in Rome, where religious censorship exists, and it was not condemned. It was entered in the Venice Film Festival of 1948 without objection from the Vatican's representatives on the screening committee and on the jury. There will be submitted

with this affidavit an official statement by a member of the Italian Ministry to the effect that The Miracle was approved by the Italian Government for public presentation (Ex-[fol. 69]hibit 1); a statement of the President of the Italian Motion Picture Industry to the effect that government approval of the film could not have been secured if the film was considered blasphemous (Exhibit 2); and a statement by the Director of the Venice Film Festival that the film was exhibited there, and would have been rejected if considered blasphemous (Exhibit 3). Also, according to the report of Life Magazine (Exhibit 4), the Vatican newspaper, L'Osservatore Romano, in reviewing The Miracle, made no criticism of it on religious grounds.

6. The Miracle was passed by the U. S. Customs authorities when it was brought to America. It was approved and recommended, as a part of Ways of Love, by the National Board of Review of Motion Pictures. (The National Board is an independent, non-profit company organized in 1909 to promote the development of motion picture films. Its function is to review films and disseminate information about them to motion picture producers, exhibitors and public opinion organizations.) Ways of Love was also widely acclaimed as an artistic triumph and received an award from the New York Film Critics as the best foreign language film of 1950. (The New York Film Critics is an Association of the motion picture critics of the major metropolitan newspapers, consisting of members of all religious faiths from the staffs of The New York Times, The Herald-Tribune, The Daily News, The New York Post, The Journal-American, The Morning Telegraph, The Brooklyn Daily Eagle, The Compass and The Daily Worker.) A great number of Protestant ministers, including Congregationalists, Presbyterians, Methodists, Unitarians, Episcopalians, and members of the Evangelical and Reformed Church, found that the film was not sacrilegious; and some believe it to be pious and reverent. Eminent theologists, educators, psychologists, motion picture and dramatic critics, curators of museums, artists, poets, publishers, authors, playwrights, editors, radio commentators, economists, and business executives of the Roman Catholic,

Protestant and Jewish Faiths, have made statements indicating that they found no objection to the film on religious grounds. Documentation will be found in the letters, newspaper and magazine articles, texts of radio broadcasts and sermons submitted herewith as exhibits. To facilitate examination of the numerous exhibits by the Regents, I am appending a list of the exhibits with extracts from some of them. The exhibits do not include all the data supporting the position taken herein. I have not included hundreds of favorable letters and innumerable articles published in periodicals throughout the civilized world. The Regents are, I am sure, aware of the general editorial condemnation of the first attempt to suppress *The Miracle*, and will undoubtedly recall many such items in local papers which, for practical reasons, are omitted.

7. In view of the foregoing, it must be conceded that there is a reasonable basis for the determinations by the Motion Picture Division that the film was not sacrilegious. At most there is merely a difference of opinion on that question, a difference which does not warrant revocation of the license. To my knowledge, all Protestant clergymen who have ex-[fols. 71-72] pressed themselves on the subject believe the film is not sacrilegious. As the exhibits indicate, there are prominent Roman Catholics who share that view. I have in my possession an affidavit alleging that two members of the Legion of Decency (the Roman Catholic organization that initiated the protest against the film) were not opposed to it. If requested I will forward the aforementioned affidavit to the Board of Regents. I have been advised by the owner of the world rights to the picture that it was rejected by a purchasing agent for Communist controlled countries on the ground that it was pro-Catholic propaganda. Even if the members of any single religion were unanimously opposed to the exhibition of the picture, it may not be banned on that ground, for that would be a violation of the constitutional guarantee of separation of church and state.

8. In conclusion, I respectfully urge the Committee of Regents and the Board of Regents to refrain from taking any action with respect to the license for *Ways of Love*. A rescission of the license would be an act of censorship un-

authorized in law, and an unwarranted restriction of the right of free expression and communication.

Joseph Burstyn.

Sworn to before me this 2nd day of February, 1951.  
 Ephraim London, Notary Public, State of New York, No. 31-7589800. Qualified in New York County. Cert. filed with N. Y. Co. Clk. and Reg. Commission Expires March 30, 1952.

[fols. 73-74] EXHIBIT 1, AFFIDAVIT OF JOSEPH BURSTYN  
 (Translation)

THE OFFICE OF THE PRESIDENT OF THE COUNCIL OF MINISTERS

I hereby declare that the film of Italian nationality—directed by Roberto Rossellini—entitled “Amore” (“The Human Voice”—“The Miracle”) was shown to the Commission for the Showing of Motion Pictures on August 19, 1948 and it was approved by the Commission on August 30th, 1948. Said film received approval (nulla osta) No. 4472 for presentation to the public as of August 30, 1948 in public auditoriums.

Sworn to before me this 30th day of December, 1950  
 Rome. (Signed) —————, General Director.

Mary Drago (Translator).

Sworn to before me this 11th day of January 1951.

Betty Landgraf, Notary.  
 Betty Landgraf, Notary Public, State of New York,  
 No. 41-7414700. Qualified in Queens County. Certs.  
 filed with N. Y., and Kings Co. Clerks, Queens,  
 N. Y. and Kings Co. Registers. Term expires  
 March 30, 1952.

## [fol. 75] EXHIBIT 2 TO AFFIDAVIT OF JOSEPH BURSTYN

(Translation)

Associazione Nazionale Industrie Cinematografiche  
Ed Affini

Roma

Rome, December 30, 1950

Prot. 05248/M.

Re: Film "Miracolo" starring Anna Magnani, director Roberto Rossellini.

On request of the Tever Film, member of our Association, we herewith declare:

1) The film "Miracolo" obtained the regular "nulla osta" from the Government services of film censorship; the permits have never been withdrawn and are wholly valid, and consequently the film is freely circulating in all the normal theatres;

[fols. 76-77] 2) The Constitution of the Italian Republic, article 7, declares that the relations between the State and the Catholic Church are ruled by the Lateran agreements, in which it is clearly stated that the Italian State has the duty to suppress whatever action that may offend the Catholic Religion;

3) therefore, according to the present dispositions of the Italian Constitution and the Italian legislation, the "nulla osta" of censorship could in no way be granted to a film that might be considered blasphemous. If the censorship permit had been erroneously granted, the competent Authorities would have had the duty to withdraw it at any time.

The President, Sgd. (Avv. Eitel-Monaco).

Mary Drago (Translator).

Sworn to before me this 11th day of January, 1951.

Betty Landgraf, Notary Public, State of New York, No. 417414700. Qualified in Queens County, Certs. filed with N. Y., and Kings Co. Clerks, Queens, N. Y. and Kings Co. Registers. Term expires March 30, 1952.

## [fol. 78] EXHIBIT 3 TO AFFIDAVIT OF JOSEPH BURSTYN

(Translation)

Venezia, December 30th, 1950.

S. Marco, Ca Giustinian—Tel. 28-110—27-858

La Biennale Di Venezia

Mostra Internazionale

D'Arte Cinematografica

Il Direttore

## AFFIDAVIT

I herewith testify that the film "Miracolo," starring Anna Magnani, has been presented at the International Exhibition of Cinematographic Art of Venice in 1948 and that, in accordance with the regulations of the said Exhibition, in the case the film would have been in any way blasphemous, it would have been rejected by the Festival Committee.

Antonio Petrucci, Dr. Antonio Petrucci, Director.



## [fol. 79] SPECIAL TERM EXHIBIT 7 TO ANSWER

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

*Report of the Committee on "The Miracle,"*  
February 15, 1951.

To the Board of Regents:

On March 1, 1949, the Motion Picture Division of the State Education Department, on application of Lopert Films, Inc., licensed a motion picture in the Italian language, entitled "Il Miracolo." On November 30, 1950, the Division, on application of Joseph Burstyn, Inc., licensed

a Trilogy of three films, carrying the title "Ways of Love," which included the motion picture "The Miracle."

Soon after the showing of this picture at the Paris Theatre in New York City, the Education Department was fairly flooded with protests against its public exhibition. When this was followed by an unsuccessful attempt of local authorities to suppress the film by the maintenance of picket lines around the theatre in which it was exhibited and when the showing became a matter of public controversy, the Chancellor of the Board of Regents placed the matter on the agenda of the January meeting and, in the meantime, requested the undersigned three members of the Board to view the picture and be in a position to give to their colleagues their views.

The undersigned who had viewed the film described the picture to the Board and stated that in their opinion there was basis for the claim that the picture was sacrilegious. [fol. 80] So that a due and proper inquiry could be had on the question as to whether the Motion Picture Division issued the license illegally and if so whether it was in the power of the Regents to revoke same, the Board directed that the holders of the licenses be required to show cause, at a time and place fixed, why the licenses should not be rescinded and cancelled on the ground that the pictures are, and each of them is, sacrilegious. Chancellor Emeritus Wallin, Regent Brosnan and Regent Holtzmann were designated as a committee to conduct the hearing which was, under the order of the Board, restricted to the submission of affidavits and oral arguments and briefs by either or both of the licensees. However, opportunity was afforded to any organization or person who cared so to do to submit a brief. Lopert Films, Inc., the holder of the first license, did not appear and later telegraphed that it had assigned its interest in the picture.

Joseph Burstyn, Inc., the holder of the later license that was issued November 30, 1930 for the picture "Ways of Love" and which included "The Miracle" appeared specially by counsel and challenged the jurisdiction of the Board of Regents and of the committee on the ground of lack of power or authority to proceed and without attempting to meet the merits of the controversy, withdrew from

further participation in the hearing. Counsel for Joseph Burstyn, individually, and sole stockholder of the licensee, Joseph Burstyn, Inc., submitted a lengthy affidavit and voluminous exhibits in an attempt to sustain his contention [fol. 81] that any action on the part of the Regents with respect to the license was unauthorized by law and "an unauthorized restriction of the right of free expression and communication." While most of the briefs submitted were in support of the Board's power and for revocation of the license, others confined their arguments to the desirability of the censorship of motion picture films, the validity or desirability of the standards of exclusion set forth in the law and some challenged the constitutionality of the statute involved.

It might be well to state at the outset the duty of the Board in connection with the licensing of a motion picture. Article III, Part II, of the Education Law (Sections 120 to 132 thereof), provides that there shall be in the Education Department a motion picture division, the head of which shall be a director who shall be appointed by the Regents. After exempting "current events," scientific, education and certain other films, the director or such other person authorized by the Regents is required to examine each motion picture film submitted to him and to issue a license therefor unless such film or a part thereof is "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that to exhibit would tend to corrupt morals or incite to crime." It is made illegal to exhibit a picture in this State unless it has been licensed and the license number shown upon the screen and the law prohibits the granting of any motion picture license if it violates in whole or in part any one or more of the standards fixed by law.

The Board of Regents is the constitutional head of the Department and as such it is its duty to administer and enforce the law as it is enacted. By Chapter 153 of the [fol. 82] Laws of 1927, the Legislature saw fit to place the responsibility for the administration of this law in the Education Department and thus it has become the duty of the Regents to administer it as it is written. It must be emphasized that it is not within our jurisdiction to pass upon the wisdom of that law or upon its constitutionality, or

the validity or desirability of the standards of exclusion set forth therein. Those who argue on these points misconstrue entirely the powers and duties of the Regents in the pending matter.

We cannot sustain the challenge to the jurisdiction of the Board of Regents to act in this matter. As head of the Department of Education, it not only has the power, but the duty to inquire into the actions of one of its subordinates and to determine whether this act in issuing the license did or did not contravene the Law.

When the Legislature in 1927, by enacting Part II, of Article III of the Education Law, placed the Motion Picture Division in the Department of Education, it also placed the responsibility for all of the action of such division on the Regents. The legislature said so in so many words: "The Board of Regents shall have authority to enforce the provisions and purposes of Part II of this Article" (Section 132). But that grant of power was hardly necessary. The responsibility became that of the Regents by virtue of the Constitution of the State. Article V, Section 4, sets up the 19 departments of the State Government. The heads of 4 of these departments are fixed by the Constitution itself. The Governor is made the head of the Executive Department [fol. 83] and the Comptroller is the head of the Department of Audit and Control, the Attorney General of the Department of Law and the Regents of the University of the State of New York are made the head of the Education Department.

Once the Legislature placed the Motion Picture Division in this Department it could not constitutionally divest the Regents either of the power or responsibility for functions lodged therein. The Legislature, in enacting the Education Law, recognized this constitutional mandate. Section 101 of the Education Law charges the Department with the general management and supervision of public schools, operations of the University of the State of New York and the exercise of *all of the functions of the Education Department*. It placed upon the Regents all the responsibilities "vested in such department or university or any sub-department, division or bureau thereof." It follows almost literally the words of the Constitution by saying: "The

head of the Department shall continue to be the Regents of University of the State of New York, who shall appoint and at pleasure remove the Commissioner of Education."

When Part II of Article III was written into the Education Law and set up the Motion Picture Division, it provided that the head of the Division shall be a director appointed by the Regents. Consonant with the general pattern of responsibility contained both in the Constitution and in the statute, the Regents were given the right to consolidate the Motion Picture Division with another division and permitted the assignment to the Division of the functions, powers and duties of other divisions, bureaus or [fol. 84] officers in the Department. The Regents were given the power in this section (120) to appoint such officers and employees as they deemed necessary and to prescribe their powers and duties. The very section dealing with licenses (122) does not limit the power to issue same to the Director of the Division, but provides that when authorized by the Regents, that power of licensing may be vested in other officers.

If any doubt existed as to the legislative intent to place the full responsibility of the administration of this statute by the Regents, it is dissipated by the words of Section 132, which not only gives the Regents the power to make all needful rules and regulations to carry out the purposes of the statute, but states that the Board "shall have authority to enforce the provisions and purposes of Part II of this Article."

We see no force in the argument that because there is a specific provision allowing an appeal from the denial of the Division to grant the license, it excludes a review by the head of the Education Department, on its own initiative, of the acts of one of its divisions in granting a license.

The statute prohibits the issuing of a license for the exhibition of a film, any part of which is obscene, indecent, immoral, inhuman or sacrilegious. The granting of a license to a film that comes within this condemnation would be an illegal act. It is inconceivable that it was ever intended that the head of the Department could not have the power to vitiate an illegal act performed by any "sub-

department, division or bureau" under its supervision and for the acts of which it is by law specifically made responsible (Section 101).

[fol. 85] Prior to the enactment of Chapter 624 of the Laws of 1950, it might have been argued that under the authority of *Hughes Tool Company v. Fielding* (188 Misc. 947, aff'd 272 App. Div. 1048; aff'd 297 N. Y. 1024) there still remained a way of remedying the effect of an illegal act of the Division in licensing a prescribed film. It was held in that case that notwithstanding such a license, there still could be a criminal prosecution for showing a film which violated the law. Such remedy, if any no longer exists since the Legislature in 1950 by Chapter 624 amended Section 1141 of the Penal Law so as to give complete immunity from criminal prosecution for the exhibition of any motion picture which bears the State's seal of approval.

We cannot follow an argument that would leave the Regents, the head of the Department, powerless to remedy a situation so impossible.

The licensee quotes a recent decision of the Appellate Division, First Department, *D. & D. Realty Corp. v. Coster, et al.*, N. Y. Law Journal, February 5, 1951, as an authority in support of its contention that the action in granting the license is not subject to reconsideration. In our opinion this case is not here applicable. The question is whether an act was or was not illegal. It is clear from a reading of that decision that the illegality of an act takes it out of the operation of the rule there laid down. It needs but a reading of the decisions quoted in the opinion in that case by Mr. Justice Van Voorhees to show that these cases are really authority in support of the right of the Regents to conduct the inquiry.

[fol. 86] Judge Cardozo in the case of *Matter of Equitable Trust Company v. Hamilton*, 226 N. Y. 241 (at 244), laid down the rule that the same administrative body that acted on a matter before it may rescind that action for a misconception of the merits and that even a later board may rescind for illegality. The other case, *People ex rel. Finnigan v. McBride*, 236 N. Y. 252, involved the question of the right of a civil service commission to cancel an eligible list. To

the argument that it had no legal power so to do even where the list was illegally promulgated, Judge Pound said, at page 257:

" \* \* \* that the establishment of an illegal list sanctifies it in the presence of its own creator seems an impotent conclusion."

In any event, the Board of Regents, as the responsible head of the agency passing on the application for license, has not acted before.

The Regents neither sought nor welcomed the placing in them of the power of censorship of motion pictures. When, however, our duty becomes clear under the law we will carry out our constitutional responsibility.

We see no legal obstacle to the Regents proceeding to the consideration of the main question in issue, namely: whether the license to the film "The Miracle" was or was not granted illegally.

We recommended that the members of the Board of Regents, as a Committee of the Whole, should view such motion picture and we arranged to have it available for them to do so. This they have done.

[fol. 87] We submit herewith the transcript of the hearing and all the affidavits and briefs which were filed with us.

Respectfully submitted, William J. Wallin, John F. Brosnan, Jacob L. Holtzmann.

Dated, February 15, 1951.

#### SPECIAL TERM EXHIBIT 8 TO ANSWER

For Immediate Release

From the New York State Education Department

Report of the Committee of the Whole, February 16, 1951

All members of the Board of Regents present at this meeting, and consisting of a majority of the entire Board, and a quorum thereof, sitting as a Committee of the Whole, having considered the report of the Committee on "THE

MIRACLE" and the affidavits, briefs and other documents filed therewith and all of such members of the Board of Regents having viewed such motion picture, now, after full discussion and deliberation, unanimously find and report:

That said motion picture, "THE MIRACLE," is sacrilegious and not entitled to be licensed under the provisions of Section 122 of the Education Law and, therefore, it becomes [fol. 88] the duty of this Board to rescind and cancel the licenses of this picture heretofore issued by the Motion Picture Division of the Department of Education.

Under the laws of our State, no picture (other than some specifically exempted by statute) may be shown unless it first has been licensed and the law expressly forbids the licensing of any picture that is, in whole or in part, sacrilegious. After viewing this picture, we have no doubt that it falls in the category condemned by law.

In this country where we enjoy the priceless heritage of religious freedom, the law recognizes that men and women of all faiths respect the religious beliefs held by others. The mockery or profaning of these beliefs that are sacred to any portion of our citizenship is abhorrent to the laws of this great State. To millions of our people the Bible has been held sacred and by them taught, read, studied and held in reverence and respect. Generation after generation have been influenced by its teachings. This picture takes the concept so sacred to them set forth in both the Protestant and Catholic versions of the Bible (St. Matthew, King James and Douay Versions, Chapter I, verses 18-25) and associates it with drunkenness, seduction, mockery and lewdness.

As to our power and authority to rescind the licenses, we unanimously adopt and approve the report of our Committee. We recognize that when the Legislature in 1927, placed the Motion Picture Division in the Department of Education, it placed upon us, as the constitutional head of that Department, the responsibility for its proper enforcement. [fol. 89] The Regents neither sought nor welcomed such power of censorship. However, in this case, we have a clear and compelling duty under the law to carry out our constitutional responsibility.

Therefore, the license issued by the Motion Picture Divi-

sion on March 1, 1949, to Lopert Films, Inc., for the motion picture in the Italian language entitled "Il Miracolo" and the license issued on November 30, 1950, to Joseph Burstyn, Inc. for the Trilogy of films carrying the title "Ways of Love," which included the motion picture "THE MIRACLE" should in all respects be canceled and rescinded. An application may be made to the Motion Picture Division for a license of so much of the Trilogy, "Ways of Love," as does not include the motion picture, "THE MIRACLE."

Now, Upon motion of the Vice Chancellor, it was unanimously

~~RESOLVED~~, that the motion picture, "THE MIRACLE" is a sacrilegious motion picture, not entitled to a license under the law; and it is

FURTHER RESOLVED, that the license issued by the Motion Picture Division on March 1, 1949 to Lopert Films, Inc. for the motion picture "Il Miracolo" be and the same hereby is canceled and rescinded and that the license issued on November 30, 1950, to Joseph Burstyn, Inc., for the Trilogy, "Ways of Love" which included the motion picture "THE MIRACLE" be and the same hereby, likewise is canceled and rescinded.

[fol. 90] An application may be made to the Motion Picture Division for the licensing of so much of the Trilogy, "Ways of Love" as does not include "THE MIRACLE."

#### SPECIAL TERM EXHIBIT 9 TO ANSWER

Answer to Ephraim S. London from Charles A. Brind, Jr.,  
January 23, 1951

January 23, 1951.

Ephraim S. London, Esq., London, Simpson & London, 150 Broadway, New York 7, N. Y.

Dear Mr. LONDON:

This acknowledges receipt of your letter of January 22.

I would assume that the committee appointed by the Regents will follow the same practice that has been in effect with respect to motion picture hearings in the past. The

hearing will consist of the presentation of oral argument by the parties concerned and the submission of any affidavits by way of evidence or any documents which they desire to submit.

The technical rules of evidence in respect to the authentication of the documents is not insisted upon, although I presume that the more authority back of them, the more weight they would probably have.

[fol. 91] You would have the legal right, in appearing before the committee, to reserve all of your rights in respect to the challenge of the committee's jurisdiction. This would mean that if the decision is adverse to you and you initiate a proceeding under Article 78 of the Civil Practice Act to review the action of the Regents, the fact that you acquiesced in the hearing before the Regents would not preclude you from raising any technical or legal objection which you believe are pertinent to you.

You ask about the procedure before the Regents in respect to the adoption of the resolution, copy of which was contained in the order to show cause, which you have. You will appreciate that the action of the Regents was merely authorization for the appointment of the committee and the committee's authority to conduct a hearing. The Regents have power to conduct a hearing in respect to any matter under their jurisdiction under the Education Law. No decision was made in any way by the Regents concerning whether they have power to rescind the present license, or whether the facts would warrant such a rescission. Such an action by the Regents will need to await the recommendation of its committee. The vote on the aforesaid resolution was unanimous, all Regents were present except Mr. Straus and Mrs. Gannett who were out of the State.

I have discussed with Mr. Wallin, Chairman of the Committee, the proposal contained in the last paragraph of your letter. He advised me that he does not believe his Committee has authority to submit the controversy to the Appellate Division upon an agreed statement of fact. For that [fol. 92] reason, the Committee will, therefore, need to proceed with the hearing as planned.

Sincerely yours, Charles A. Brind, Jr.

B:G

Letter from Ephraim S. London to Charles A. Brind, Jr.,  
January 22, 1951

LONDON, SIMPSON & LONDON

Counselors at Law

150 Broadway

New York 7

Telephones

0043

WOrth 2-0044

January 22, 1951.

Charles A. Brind, Jr., Esq., State Education Building,  
Albany 1, N. Y.

Re: License for Film "Ways of Love"

Dear Mr. BRIND:

Thank you for forwarding the order to show cause to my home. This will confirm my advice to you in our telephone [fol. 93] conversation that I am authorized to accept service of such order for the licensee, Joseph Burstyn, Inc.

The licensee has not yet decided upon the action to be taken, but if it does appear at the hearing and submits evidence, I understand that there will be no insistence on strict compliance with technical rules of evidence; that letters, press clippings and unauthenticated documents will be acceptable. It is also my understanding that the appearance of the licensee at the hearing will not be deemed an acquiescence in the jurisdiction or authority of the Regents to revoke the license, nor of their right or authority to conduct the proposed hearings.

As there is no precedent for the proposed action by the Board of Regents, I assume there are no rules or regulations with respect to notice. I think ordinary fairness or the rules of due process would require that the licensee be apprised, in sufficient time to permit answer, of the reason or basis for the proposed action. I think it should also be advised of the number and names of the Regents present at the meeting at which the resolution was adopted and the number and names of those who voted in favor of the resolution, so that it may know whether a quorum was present, etc. Perhaps a transcript of the minutes of the meeting

will furnish the information. If so, please forward it to me and I will remit whatever fee is appropriate.

It appears from items in the newspapers that certain of the Regents, and even members of the sub-committee appointed to conduct the hearings, have some question with respect to the authority of the Regents to revoke the license. The licensee also questions that authority. I believe the [fols. 94-97] matter should be submitted to the court for determination in the first instance. That procedure may save the Board considerable time and expense. If the Regents will consider submitting the question to a court of appropriate jurisdiction before conducting the hearing, please telephone or wire me collect. In any event, I will appreciate your prompt reply to this letter.

Hoping you will forgive its length, I am,

Respectfully yours, Ephraim London.

L:M

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 98] SPECIAL TERM EXHIBIT 11 TO ANSWER

Order Transferring Proceeding to Appellate Division

At a Special Term of the Supreme Court held in and for the County of Albany, at the Court House, in the City of Albany on this 20th day of February, 1951.

Present: Hon. Kenneth S. MacAffer, Justice.

In the Matter of the Application of JOSEPH BURSTYN, Inc.,  
Petitioner,

For an Order pursuant to Article 78 of the Civil Practice  
Act

against

LEWIS A. WILSON, Commissioner of Education of the State of New York, and John P. Myers, William J. Wallin, William Leland Thompson, George Hopkins Bond, W. Kingsland Macy, Edward R. Eastman, Welles V. Moot, Caroline Werner Gannett, Roger W. Straus, Dominick F. Maurillo, John F. Brosnan, and Jacob L. Holtzmann, as Regents of the University of the State of New York, Respondents

The Petitioner herein having made application by Order to Show Cause for an order against the Respondents herein [fol. 99] pursuant to Article 78 of the Civil Practice Act, and for an order enjoining the Respondents from rescinding and cancelling the licenses issued for the exhibition of the motion picture films "The Miracle" and "Ways of Love" and said motion having duly come on to be heard before this Court on February 16, 1951 and the attorneys for the respective parties hereto having orally stipulated upon the argument of the application that an order granting such review pursuant to Article 78 of the Civil Practice Act should be made.

Now, on reading and filing the Order to Show Cause dated February 16, 1951, the petition of Joseph Burstyn, Inc. verified February 16, 1951, together with exhibits thereto annexed and due deliberation having been had thereon,

Now, upon motion of O'Connor & Farber, Esqs., attorneys for Petitioner, it is

Ordered, that this proceeding be and it is hereby transferred for a disposition to the March term of the Appellate Division of the Supreme Court for the Third Judicial Department, and it is further

Ordered, that the Respondents serve upon the Petitioner and file with the Clerk of the Appellate Division of the Supreme Court for the Third Judicial Department their answer to the petition herein on or before February 27th, 1951 to which answer shall be annexed a certified transcript of the record of all proceedings subject to review and consideration therein, including all affidavits and other evidence submitted at the proceedings had by the Respondents, [fol. 100] And, upon reading and filing the affidavit of Joseph Burstyn sworn to February 14, 1951 in support of the motion for an order enjoining the Respondents herein from rescinding and cancelling the licenses issued for the motion pictures "The Miracle" and "Ways of Love"; and the Court having rendered and filed its opinion in writing with respect thereto on February 16, 1951.

Now, on motion of Charles A. Brind, Jr., Esq., attorney for the Respondents, it is hereby ordered that the application of the Petitioner for an order restraining and enjoining the Respondents from cancelling and rescinding the licenses theretofore issued by the Motion Picture Division of the Department of Education for the exhibition of the motion picture films "The Miracle" and "Ways of Love" be and the same hereby is denied without prejudice.

(S.) Kenneth S. MacAffer, Justice of the Supreme Court.

[fol. 101] SPECIAL TERM EXHIBIT 12 TO ANSWER

Italian Dialogue, English Translation and English Subtitles  
STATE OF NEW YORK.

County of New York, ss:

This Is To Certify that the attached is a photostatic copy of the Italian script with English translation and the list of English superimposed titles received by the Motion Pic-

ture Division in connection with application for license of the motion picture The Miracle, which picture was included in the motion picture entitled Ways of Love.

Hugh Flick, Director Motion Picture Division.

Sworn to before me this 26th day of February, 1951.  
Agnes Wegener, Notary Public in the State of N. Y.  
Qualified in Bronx County. No. 03-4186350. Certificates filed in New York, Bronx Co. Clk's & Reg. Office. Commission Expires March 30, 1951.

## IL MIRACOLO

REEL 1

Nannina:

Giuseppe e Santo Maria . . . Oh Gesu',  
Giuseppe e Maria io lo sapevo che

saresti venuto, Dio quanto sei  
bello! Mo perche' te ne vai? Non  
te ne andare no! Ti posso parlare,  
si! Dio che consolazione! Bello,

bello santo mio, bello! Che felicita'  
che gioia! Io lo sapevo che saresti

venuto sai! Gesu', Giuseppe, Maria,  
bello santo mio, santo mio, io

sentivo sempre la tua voce, sempre e  
se chiudevo gli occhi, ti vedeva  
pure in una grande luce che mi sorridevi  
a me, proprio a me, Eh, che ridere,  
che ridere, che consolazione San

Giuseppe, mio santo, mio santo, mio  
bello santo, mio devozione mia, tu sei  
il piu' bello di tutti i santi, o sai . . .  
San Giuseppe mio . . . no, non te ne  
andare, non te ne andare cosi' . . . e mo  
che sei venuto non te ne devi andare  
cosi'. Mi devi fare la grazia, mi de-  
vi pertare via, a te che ti ci vuole,  
no! Tu mi fai morire e e' fatta. E

## THE MIRACLE

REEL 1

Joseph and Mary . . . Oh, Jesus, Joseph and  
Mary . . . I knew that you would come, Lord, how  
handsome you are! Why are you leaving now?  
Don't go, don't! May I speak to you? Yes!  
Lord, what comfort! Handsome, handsome, Saint  
of mine, handsome! What happiness, what joy!

I knew that you would come . . . one day, you  
know! Jesus, Joseph and Mary, handsome Saint  
of mine,

my Saint, I always heard your voice — always —  
and when I closed my eyes I saw you in a  
bright light and you smiled at me, at me alone.  
What laughter, what laughter, what solace, St.  
Joseph, my Saint, my Saint, my handsome Saint,  
my devotion. You are the handsomest of all  
saints, you know, my St. Joseph . . . No, don't  
leave like this . . . now that you've come you  
cannot leave me so . . . now that you've come you  
cannot leave me so.

You must give me your grace, you must take  
me away, it won't be difficult for you!

Just make me die and everything will be fine . . .  
then take me to Heaven with you, before the  
Lord. How lovely! What happiness! . . . What  
joy, my St. Joseph, you are the kindest  
of all saints I know, oh yes, for, for if

mi perti con te lassu', in paradiso  
nella contemplazione del Signore. Che  
bello! Che felicita! Che . . . che gioia,  
San Giuseppe mio, tu sei il santo piu'  
buono che io conosca, e si', perche',  
perche' se no il Signore non ti  
avrebbe affidato la Madonna con il  
bambino. E allora fammi la grazia, me  
ne hai già fatte tante, tutto m'hai  
fatto dare, che gentilezza come ti  
facevo una preghiera ti chiedevo qualche cosa,  
subito me lo facevi dare. Questo è il vesti-  
no che mi . . . che mi hanno regalato le monache  
quello che t'ho chiesto ti ricordi? E mo mi  
danno pure la minestra calda e m'hanno ac-  
conciato pure per dormire.  
Io non chiedo mai niente agli altri santi, no,  
no, no, mai, tu pero' non mi fare scherzi, no,  
io lo so come succede, che a un certo momento  
tu sparisci e io resto qua' sola. San Giu-  
seppe mio, San Giuseppe mio, bello, tu mi  
devi portare, tu mi devi portare lassu' con  
te nell'alta patria, che felicita', tanto qui'  
nessuno se ne accorge se io moro, le capre,  
quelle sanno tornare pure da sole al paese . . .  
San Giuseppe, bello santo mio, bello, e il  
Giglio dove? Che bello che sei, tu quanto  
sei bello; che ci sto a fare io qua'? Una

you weren't so the Lord would not have  
entrusted you with the Madonna and her Child.  
Well then, give me this grace . . . you have  
given me so many . . . you have seen to it that  
I receive everything . . . What kindness . . .

just as soon as I prayed for something . . . asked  
for something, you saw to it that it was  
granted me. This is the dress that . . . that  
the nuns gave me, do you remember?

And now they give me warm soup too, and they  
have set up a place for me to sleep.

I never ask anything of the other saints, no,  
no, no, but don't you play any tricks on  
me, no, I know what happens, suddenly, you  
disappear and I'm left all alone. My

St. Joseph, my handsome St. Joseph . . . You  
must take me, you must take me up there with  
you. What happiness! No one here would know  
if I were to die . . . the goats, they can go  
back to the village alone . . . St. Joseph,  
handsome Saint, my handsome one, where is the  
Lily? How handsome you are, how very hand-  
some. What am I doing here? When I told them  
down.

volta che ho detto laggiu' che mi avevi  
parlatò non sai quello che mi hanno combinato,

Cosimino mi ha fatto diventare matta a me!  
Mi suonava la tromba dentro la reehia e mi  
diceva oè! Questa e' la tromba dell'arc.  
angelo Gabriele, eh! Che m'hanno combinato

Ma quelli non capiscono niente, no! Non  
sono degni, ed intanto qua' stai tu e quassu'

sta San Giuseppe, quassu' da me e' venuto  
sclo da me, e'venuto? Tu sei passato per il  
passe, e'? E non t'ha visto? E' certo  
non sono degni, non sono degni, invece, io!

Quanto sei bello! Sai che mi dicono sempre?  
I matti non possono entrare in paradiso!

A me!! Oh! Ma non e' vero! Noi e' vero  
questo, no? Sai che sono le tentazioni, tu?

Figurati che una volta io sentivo sempre una  
voce, una voce dolce, dolce, come pare che  
fosse la tua che mi dicevi sempre, buttati,  
buttati cretina, buttati e vola, ma io, io,  
io, arrivavo sempre fino qua', vedi, qua',  
qua', poi mi maneava il coraggio,  
perché pentivo e dicevo sempre dimani, dimani,  
quando suonano le campane se San Giuseppe

insiste ancora, io mi butto. Ma poi ho  
capito, ho capito perché non eri tu, no,  
sai chi era? Era il diavolo. Ah! Quello  
voleva che mi ammazzassi così' io mi dannavo

there once that you had spoken to me, you can't  
imagine what they did to me.' Cosimino drove

me mad! He blew his trumpet in my ear and he  
cried: "Oe", this is the Archang<sup>el</sup> Gabriel's

trumpet, eh!" The things they did to me!  
But they don't understand a thing, no!

They're not worthy, and anyway, here you are.  
St. Joseph is up here . . . he has come up here to  
see me . . .

to see me alone. You passed through the  
village, eh? Didn't they see you? But, of  
course, they're not worthy, they're not worthy  
. . . as for me! . . .

How handsome you are! Do you know what they  
say to me? Mad people can't go to Heaven!

For me? Oh! But that's not so! That's not so,  
is it? Do you know what temptations are? Just  
think . . . at one time I continuously heard a voice,  
a sweet, sweet voice, one like yours . . . and it  
said to me, jump, jump, you fool, jump and fly,  
but I, I, I . . . I always got to this point, this  
one set, here, here, up to this point, then I  
lacked the courage; then I repented and said,  
tomorrow, tomorrow, when the bells toll, if  
St. Joseph insists, I'll jump. But then . . .

I understood, I understood why it was not you,  
no; do you know who it was? It was the devil;  
Ah! He wanted me to kill myself so that I  
would be damned forever and never get to

e non potevo piu' andare in paradiso. Ma t'ie', so stata brava! Ma mo'... Ina mo'!

Tu sai che faccio un'altra cosa, io guarda... tu fi metti... tu ti metti feriose nell'aria lassu'... guarda... lassu'... e... e mi chiami e io ti vengo incontro... e se mi prende la paura e affondo nell'aria tu mi dai una mano e mi tirò su... un po' alla volta.

Vedrai che imparo... come, imparo come no... e poi andiamo lassu'... guarda lassu'... lassu' e'e il Santuario di San Michele, lo sai...

e già' io a te lo dico... tu sai tutto... saliamo in cima o' campanile... la si vede tutte le montagne, tutta le case, tutti... il mare si vede... e allora tu mi prendi

per mano... pure San Michele mi può aiutare... no? E tutte e tre usciamo da' campanile così... e voliamo... voliamo sulla valle di furore... voliamo sul mare... e poi scendiamo a toccare l'acqua con la punta dei piedi... e poi torniamo su... su... San Giuseppe bello,

famme mori'... famme... e se Gesu'... se Gesu tornasse in terra pure qua' mi piacerebbe di

siare... ma non torna quello. Vedi, tu sei un santo importante... mà non sei Gesu', quella faceva guarire i malati caeciaava il demonio, qua' il demonio sta dapertutto...

Heaven. But, I've been good. But now... but now!

I'm going to do something else, look... you... you get... you get up in the air, up there...

look... up there... and... and you call me and I'll meet you... and if I become frightened and sink jn th~~Air~~, you give me your hand and pul~~y~~ me up... a bit at a time. You'll see... I'll learn... of course I'll learn... and then we'll go up... look up there... up there is St. Michele's Sanctuary you know... but why do I tell...

you this! You know everything. Let's climb to the top of the bell tower... from there one sees all the mountains... all the houses, all the sea... and then you take me by the hand... St. Michele

can help me to... no? And the three of us will leave this bell tower so... and we'll fly... we'll fly to the Fior Valley... fly over the sea...

and then we'll come down and touch the water with our toes... and then we'll go up again... up...

beautiful St. Joseph, make me die... make me... and if Jesus were to return to the

earth I'd like to stay here... but He will not return, see, you're an important Saint... but you are not Jesus, he cured the sick, cast aside the demons... here we have demens on

tutti sono malati e ... se lui ritornasse,  
oppure facesse finire il mondo subito tanto ...

i segni divini questi e'! ... E già' ... Non sei  
capace tu ... sei capace tu? ... No ... è  
facile ...

E' bello ... senti ... no ... ah ... che paradiso  
... che paradiso ... o ... so tutta sudata  
... qua ... so

tutta sudata ... anche le gambe ... e' ... grazia  
... a ... ic non ti vedo quasi piu' ... e' e' fucco  
interno ... lo vedi come sei ... io lo so ... qui  
sempre piu' luce sempre piu' luce e poi

sparisci ... e perche' te ne voi andare, io non  
voglio stare qua ... e ... e ... sai quando ero  
piu' giovane, Cosimino lo scemo mi voleva  
sposare ... che scemo ... e se io adesso e' avevo  
i figlio non potevo venire con te ... portami  
via ... non me lascia' qua' ... non me lascia'  
qua' ... che paradiso ... che paradiso ...  
dammi da bere ... dammi da bere ...

San Giuseppe mio ... San Giuseppe mio ... e  
preso un pane lo spezzo' ... e un'Angelo del  
Signore

le apparve in sogno e gli disse ... Giuseppe  
figlio di Davide non temere di prendere Maria  
in sposa ... perche' cio' che in essa e' stato  
concepito ... a ... San Giuseppe ... mio ...  
buttami

via il corpo e prenditi l'anima ... starei  
bene senza niente addosso ... qua ... San

all sides ... everyone is ill and ... if He were  
to return, or if He were to bring about the  
end of the world ... for divine sighn, these,  
eh! ... Ah yes ... you're not capable ...

are you! ... No! ... It's easy ... It's beautiful  
... Listen ... no ... ah ... what heaven ... what

heaven ... o ... I'm so perspired ... here ... I'm  
so perspired ... my legs too ... it's ... grace ...  
ah ... I almost don't see you any longer ...  
there's smoke all around ... see what you do ...  
I know

that ... here, ever more light, ever more light  
and then you disappear ... why do you want to  
leave? I don't want to remain here ... and ...  
and ... do you know, when I was younger,  
Cosimino, the fool, wanted to marry me ...  
what a fool ... and if I had children now, I  
would not be able to come with you ... take me  
away ... don't leave me here, ... don't leave me  
here ... what heaven ... what heaven ... give me  
something to drink ... I'm not well ... give me

something to drink, I'm not well ... My St.  
Joseph ... My St. Joseph ... and taking a loaf of  
bread he broke it ... and an Angel of the Lord  
appeared to him in a dream and said ... Joseph,  
son of David, have no fear to take Mary as  
your bride ... for what is being conceived  
in here ... a ... St. Joseph ... my ... cast aside  
my body and take my soul ... I would feel so  
happy without this weight ...

Giuseppe ... San Giuseppe e' venuto a visit- here ... St. Joseph ... St. Joseph has come to  
armi, che paradiso, che paradiso interra ... a visit me, what heaven, what heaven on earth ...  
matta ha ricevuto la grazia ... io sto male ... the mad woman has received a grace ... I'm ill,  
sto male ... Iamme ... Iamme. ... I'm ill ... Oh ... Oh ...

## IL MIRACOLO

REEL 2

Nannina:

Bongiorno, fra Raffaello.

Fra Raff:

Bongiorno.

Nannina:

Ditemi na cosa, i santi possono  
apparire si!

Fra Raff:

Si, io i vego sempre i santi.

Nannina:

Voi!

Fra Raff:

Sempre a Madonna.

Nannina:

Voi.

Fra Raff:

Spesso e volentieri.

Nannina:

Ma come! Si possono vedere son  
questi occhi?

Fra Raff:

Oochio.

Nannina:

Ah! E chi avete visto?

## THE MIRACLE

REEL 2

Good day, Fra Raffaello.

Good day.

Tell me something, saints can appear,  
can they not?

Yes, I always see saints.

You!

Always ... the Madonna.

You.

Often, and gladly

How! Can they be seen with these  
eyes?

Even with one!

Ah! And whom have you seen?

Fra Raff:  
A Madonna.

Nannina:  
A vedete sempre?

Fra Raff:  
Sempre, tutti i giorni.

Nannina:  
Gesu'! E. e' bella?

Fra Raff:  
Bellissima.

Nannina:  
E, o sapete! Io ho visto San Giuseppe  
proprio mo, a capo d'orso laggia', e gli  
ho parlato pure, tanto, come ere bella,  
Fra Raffae', io o' voglio rivedere.

Fra Raff:  
Quello mo sape a strade e torna.

Nannina:  
Voi dite.

Fra Raff:  
Quando e Sinore vuole!

Frate:  
Ehi, c'e'?

Nannina:  
Ma come sarebbe a dire, on sapete che  
e' successo un miracolo?

Frate:  
Ma che miracolo?

The Madonna.

Do you always see her?

Always, every day.

Lord! And is she lovely?

Very lovely.

Say, you know! I saw St. Joseph, just  
now, at Capo d'Orso, up there, and I  
spoke to him

too, for a long time, he was so handsome.  
Fra Raffae', I'd like to see him again.

He knows the way now and he'll come back.

Do you mean it?

When the Lord wishes!

Say, what is it?

What do you mean? Don't you know of the  
miracle?

But what miracle?

Nannina:

Gesù, ma voi non avete avuto mai apparizioni?

Frate:

So vent'anni che faccio il frate, non ho mai visto no miracolo.

Nannina:

Uh! Fra Raffaello che dici?

Fra Raff:

Chillo e' nu materiale.

Nannina:

Lui ha avuta l'apparizione.

Cosimino:

Ta si fragata a mela ... dammè a mela, dammela la mela e' la tea e' la mea,

Vattene.

#### CANZONE E PIANTO BAMBINO

Donna (Woman):

Nanni'--

Nanni':

E si', pronti ... tutti e due si si belli e Nanni', belli e Nanni,

Woman:

Gesù, e' incinta. Nanni' lo sai che sei incinta.

Nanni:

E non mi tocate, non mi tocate, e' la grazia del Signore.

Woman:

Si ... a ... grazia ...

Lord, haven't you ever had apparitions?

I have been a monk for twenty years and I have never seen a miracle.

Oh! Fra Raffaello, what is he saying?

He is a materialist.

He has had an apparition

You've stolen the apple ... give me the apple, give me the apple, it's yours and mine,

go away

#### SONGS AND CHILDREN'S CRIES.

Nanni:

Yes, ready ... both of them so lovely, and Nanni', lovely and Nanni'.

Lord, she's pregnant. Nanni', do you know that you're pregnant?

Don't touch me, don't touch me, it's the grace of God.

Yes ... a ... grace ...

Nanni:

A me! A me! A me!

REEL 3

Cosimino:

Via, via fetente, via, via.

Nanni:

Cosimino, lascia sta a roba mia, er  
dimonio t'ha preso, cattivo, cattivo,

pure a preghiera t'ho detto: va via, via.

Andrea:

Era in posto mio cattivo.

Monk:

Nena, mena.

Cosimino:

Va via, fetente.

Woman:

Oh, Nanni, vieni qua'

Nannina:

A me!

Woman:

Nanni, vieni, e qua nessuno mangia, non  
aver paura.

Nanni:

A me!

Woman:

Si' si vieni un po' qua', tienimi questo.

Nanni:

Subito signora,

To me! To me! To me!

REEL 3

Away, away you vile one, awhy, away.

Cosimino, leave my things alone, the  
devil has taken you, you bad one,  
bad one  
go away, away.

He was in my place, bad one.

Go away, vile one

Say, Nanni, come here

Who, me?

Nanni, come here, no one bites here,  
you needn't fear.

Who, me?

Yes, yes, come here a moment, hold  
this for me

Yes, of course, Signora.

Woman:

Felice e' andato a Maiore e ancora non torna, quello quando va via s'sparisce,

si perde per la strada, appena finito me vai a prendere un poco d'acqua!

Nanni:

Signo', non posso fatiga'.

Woman:

Io ti regalo.

Nanni:

Sì, lo so, ma non posso.

Woman:

Cosa ci vuole per una brocca d'acqua, domattina me lo fai un bucato?

Nanni:

Signo', grazie tanto, ma non posso lavora'.

Woman:

E perché?

Nanni:

E'

Woman:

Eh! Fesserie, io due ore prima di sgravare, e ho avuto due gemelli, ho lavorato.

Nanni:

Sì, lo so.

Police has gone to Maior and he hasn't returned ... when he goes away he seems to disappear,

He gets lost on the way. When we're through with this would you get me some water!

Signo', I can't work.

I'll give you something.

Yes, I know that, but I can't.

You need no strength for a pitcher of water, will you do my wash tomorrow?

Signo', thank you so much, but I can't work.

And why not?

It's!

Oh, that's all nonsense, I worked up until two hours before I gave birth, and I had twins.

Yes, I know.

Woman:

Tu devi mettere giudizio, pensi che  
devi avere un bambino, adesso qualche  
cosa te  
la devi mettere da parte.

Nanni:

Signo', questo non ha bisogno di  
niente, io non posso fatica' ... pure  
se io mi more  
di fame non fa niente, ma questo  
rispetto lo devo avere.

Second Woman:

Oe' Nanni! Nanni', vieni a ca', Nanni'.

Nanni:  
E!

Second Woman:

Nanni', vieni a ca'.

Nanni:

Subito, scusate e'.

First Woman:

Prego.

Nanni:  
A me?

Second Woman:

Nanni, oh!

Nanni:

Scusatemi, signora'.

First Woman:

Fai, fai ...

You must be sensible, you must remember  
that you will soon have a child, you will  
have to  
save.

Signo', this child will have need of  
nothing, I can't work ... even if I were  
to die of

hunger, it doesn't matter ... But I must  
have this respect for the child.

Say, Nanni! Nanni', come here, Nanni'.

Yes!

Nanni', come here.

Coming, excuse me.

Go right ahead.

You're calling me?

Say, Nanni!

Excuse me, Signore.

Go right ahead, please ...

**Second Woman:**

Nanni', ti sei degnata scendere fra noi poveri mortali, quale onore ci fai!

**Nanni:**

A me!

**Second Woman:**

Sì, a te... tu eri sparita, pensavamo che ci avessi schifato, Nanni'.

### VOCIO RAGAZZI

**Young Man:**

Perche' non vi degnate?

**Nanni:**

Piange mo, perche' piage?

**Voices:**

E' l'emozione, e' l'emozione, tu sei stata toccata dal signore, vieni, vieni

Con noi.

**Girl:**

Tu non sai quello che si crede di essere.

**First Woman:**

Voi non dovete sfotterla.

**Boy:**

Quella e' diventata ancora più' scema.

**First Woman:**

Povera donna, lasciatela stare.

**Boy:**

Sì, altro che povera donna.

Nanni', you have deigned to come down among the mortal one, what a great honor you do us!

Do you mean me?

Yes, you... we thought you had disappeared, we thought you shunned us all, Nanni'.

### VOICES CHILDREN

Why didn't you deign to stay with us?

She's crying now, why is she crying?

She's overcome, she's overcome with emotion, you've been touched by the Lord, come, come with us.

You don't know who she thinks she is.

You mustn't make fun of her.

She's become even a greater fool.

Poor woman, let her be.

You said it, she's an unfortunate woman.

Voice:

Lina Tonino venite.

Fourth Woman:

E allora?

Nanni:

Sempre davanti alla casa del Signore, io ...  
sempre davanti alla casa dei Signore ...

perche' io avevo paura di venire fra  
voi ... avevo paura che mi pigliavate per  
matta!

Voice:

No, ma che dici ... no.

Boy:

Cosi' e cosi' ti sta bene ... si cosi'.

Fifth Woman:

Nanni', Nanni', ma capisci ti fanno  
onore.

Nannina:

Cosimello m'ha cacciata, lo sapete? ...  
Ma questa e' la volonta' del Signore,  
fra voi covevo venire.

Voice:

Nanni.

Nanni:

E!

Voice:

Nanni', vedi che ti buttano, Nanni oh,  
e yedi!

Lina Tonino, come.

And then?

I was always in front of the house of  
the Lord ... always in front of the  
house of the Lord because I was afraid  
to come down here with you ... I was  
afraid that you would call me mad!

No, what are you saying ... no.

So, so, it looks well on you.

Nanni', Nanni', do you understand  
that they're honoring you.

Cosimello threw me out, do you know  
it? ... But so is the will of the Lord,  
he wanted me  
here among you.

Nanni'.

Yes!

Nanni'

Nanni':

A me! Questo!

Voices:

Nanni', Nanni', Nanni', si a te a te.

Nanni':

A me, grazie e grazie.

Chorus:

Evviva Maria; Maria, evviva  
Evviva Maria, e chi la creo'.

Girls:

Nanni', ti sta bene e'?

Nanni':

Ma no, no che fate!

Voices:

Oh, Oh, Oh ...

#### REEL 4

Nanni':

Mio Dio, perdona loro, non sapno quello  
che fanno. No! Bastardi, no, cose'  
no, no.

Che cattivi, figliolo benedetto, stia  
tranquillo la difendo io—Dio mio.

Oh, figlio santo, figliole santo—  
figliò santo, io non sono degna, sono  
troppo

una povera cosa, mio Dio, aiutami tu,  
Sia fatta la volontà tua.

Chorus:

Evviva Maria.

To me! This!

Nanni', Nanni', Nanni', yes, to you, to you.

To me! Thank you, thank you.

Hurray Maria, Maria, Hurray.  
Hurray Maria, and Who made her.

Nanni, it fits you well, doesn't it?

No, no, what are you doing?

Oh, oh, oh ...

#### REEL 4

My God, No! No! Naughty ones!

How naughty, my blessed son, never  
fear, I'll defend you—

Oh, blessed son, oh blessed son—  
blessed son, I'm not worthy, I am but  
a small creature, my God,

You help me, and may your will be done!

Hurray Maria.

Nanni' :

Oh! O Dio. Oh, oh, oh, oh, uh! Uh!  
Uh! Aiuto! Ahoh, Dio ohah, Dio,  
Dio, Dio—Oh! oh! Dio-Dio aiutami,  
Dio aiutami—(lamenti) Oh!

Figlio mio, figlio mio, creatura mia,  
creatura mia, sangue  
mio, mio, mio, mio, mio, figlio mio.

Santo mio!

Oh, Oh God! Oh, oh, oh, uh! uh!  
Uh! Help! Help! Ahoh, God ohah,  
Oh God

God, God—Oh! Oh! God—God help me,  
God help me—(laments) Oh!

My son, my son, my son, my son, my  
flesh, mine, mine, mine, my son.

My Saint!

[fol. 117] III. Anna Magnani

in

Roberto Rossellini's

*The Miracle*

from the story by Federico Fellini

(then dissolve into I.s. dictionary)

Dissolve to close-up through slot

(b) . . . ardent affection, passionate attachment,  
men's adoration of God, sexual passion, gratification,  
devotion . . .

(then fade out & fade in to picture)

### The Miracle

#### Final English Title List

1. St. Joseph?

2. Omit.

3. I knew you'd come . . .

4. How beautiful you are!

5. Are you leaving? . . . Don't go!

6. May I talk to you?

[fol. 118] 7. Lord, what consolation!

8. Handsome, handsome Saint of mine!

9. I knew you'd come . . .

10. Jesus, Joseph, Mary . . . Handsome Saint of mine

11. I always heard your voice . . .

12. And when I closed my eyes, I saw you . . .

12a. . . . in bright light . . . smiling at me . . .

13. What laughter! . . . What joy!

14. Omit.
15. You are the handsomest of all Saints, you know.
16. Omit.
17. Don't go . . . Now that you've come, you can't leave me . . .
18. Bestow your grace upon me.
19. You must take me away . . .
20. Omit.
21. Just make me die, that's all.
22. Then take me to Heaven with you . . .
23. . . . in the contemplation of the Lord.
24. Omit.
25. My Saint Joseph . . . You're the best Saint I know.
26. If it weren't so, the Lord wouldn't have entrusted you . . .
- [fol. 119] 27. . . . with the Madonna and her Child.
28. Give me your grace . . .
29. You've always looked after me . . .
30. And with so much kindness . . .
31. Omit.
32. This is the dress the nuns gave me . . . Remember?
33. And they give me warm soup . . . And a place to sleep.
34. I never ask anything of the other Saints . . .
35. But don't play tricks on me . . .
36. You disappear suddenly . . .
37. . . . and I'm left all alone.
38. My handsome Saint Joseph . . .
39. You must take me up there with you . . .
40. . . . to the other world . . .
41. Make me die now . . .
42. No one would know . . .
43. The goats will find their way to the village by themselves.
44. Saint Joseph . . . my handsome Saint . . .
45. Where's the lily?
46. 47. Omit.
48. When I told them that you spoke to me . . .
49. . . . they drove me mad.
- [fol. 120] 50. Cosimino blew his horn in my ear, shouting . . .

- 50a. "O, this is Gabriel's trumpet!"
51. The things they did to me!
52. But they don't understand . . . They're not worthy
53. Anyway, you *are* here.
54. Saint Joseph is here . . . He has come to see me  
me alone . . .
55. You passed through the village . . .
56. . . . but they didn't see you . . .
- 56a. . . . They're not worthy.
57. 58. Omit.
59. Do you know what they said to me?
- 59a. "Crazy people can't go to Heaven."
60. Omit.
61. But that isn't true, is it?
62. Do you know about temptations?
63. Once, I heard a voice . . . a sweet voice . . . like yours . . .
64. And the voice said, "Jump, you fool! . . . Jump and fly!"
65. I'd always get to this point . . . here . . .
66. . . . and then my courage would fail me . . .
67. And I'd repent and say . . .
- 67a. "Tomorrow, when the bells toll . . ."
- [fol. 124] 68. "Tomorrow, if Saint Joseph insists, I'll jump."
69. Then I knew the voice wasn't yours.
70. It was the voice of the devil.
71. He wanted me to kill myself so I'd be damned forever . . .
- 71a. . . . and never get to Heaven.
72. But I've been good.
73. I'm going to do something else.
74. You get up in the air . . . up there . . .
75. Call me . . . I'll follow you . . .
76. And if I get frightened and start falling . . .
- 76a. . . . your hand will pull me up . . .
77. . . . a little at a time . . . I'll learn how to  
fly . . .
78. And we'll go up . . . Look . . . up there . . .
79. San Michele's Sanctuary . . . you know . . .

80. Omit.
81. Let's climb to the top of the bell tower . . .
- 81a. . . . where one sees all the mountains, all the sea . . .
82. . . . you'll take me by the hand . . . San Michele will help, too . . .
83. And the three of us will leave . . . And we'll fly . . .
- [fol. 122] 84. We'll fly over the Fury Valley . . . over the sea . . .
85. And then we'll come down and touch the water with our toes . . .
86. And then we'll go up again . . .
87. Beautiful Saint Joseph . . . make me die . . .
88. If Jesus were to return to this earth . . .
89. . . . I'd like to stay here.
90. But he will not return.
91. You are an important Saint . . . but you are not Jesus.
92. He cured the sick . . . cast aside the demons . . .
93. Here there are demons on all sides.
94. Everyone is ill . . .
95. If He were to return . . .
96. . . . or bring about the end of the world . . .
97. . . . those would be signs of divinity.
98. Can you do this? . . .
99. Omit.
- 100 to 102. Omit.
103. I'm so perspired . . .
104. And my legs . . .
105. I can hardly see you . . .
106. There's a fire within me . . .
- [fol. 123] 107. Omit.
108. And a great light . . . Lots of light . . .
109. . . . and then you disappear . . .
110. Why do you want to leave?
111. I don't want to remain here.
112. You know, when I was younger . . .
113. . . . crazy Cosimino wanted to marry me . . .
114. What a fool!
115. If I had children, I couldn't go with you now.

116. Take me away . . . Don't leave me here . . .  
 117. Don't leave me here . . .  
 117a. Give me something to drink . . .  
 118, 119. Omit.  
 120a. I'm not well . . .  
 120. "And taking a loaf of bread, He broke it . . ."  
 121. "And an Angel of the Lord appeared in his dream  
and said . . ."  
 122. "Joseph . . . Son of David . . ."  
 123. "Have no fear to take Mary as your bride . . ."  
 124. ". . . for what has been conceived here . . ."  
 125. Saint Joseph . . .  
 [fol. 124] 126. Cast aside my body and my soul . . .  
 127. I'd feel so happy without this weight.  
 128. Omit.  
 129. Saint Joseph has come to me . . .  
 130. What Heaven . . .  
 131. Heaven on earth . . .  
 132. The mad woman has received grace . . .  
 133. Omit.

End of Reel 1.

The Miracle, Reel 2

134. Omit.  
 135. Tell me . . . Saints do appear, don't they?  
 136. Yes, I always see Saints.  
 137. Also the Madonna.  
 138. Often and at will.  
 139. Can they be seen with these eyes?  
 140. Even with one eye.  
 141, 142. Omit.  
 143. You see the Madonna?  
 144. Yes . . . Every day.  
 145. And is she beautiful?  
 146. Most beautiful.  
 [fol. 125] 147. You know, I saw Saint Joseph, up there at  
Cape d'Orso . . .  
 148. I spoke to him, too for a long time . . .  
 149. Omit.  
 150. He was so handsome . . . I'd like to see him  
again . . .  
 151. Now that he knows the way, he'll come back.

152. Omit.  
 153. If the Lord wills it!  
 154. Haven't you heard about the miracle?  
 155. What miracle?  
 156. Haven't you ever seen an apparition?  
 157. I'm a monk 20 years and I've never seen a miracle.  
 158. What is he saying?  
 159. He's a materialist.  
 160. Omit.  
 161. I stole the apple!  
 162. Give it to me . . . Half is mine . . .  
 163. Omit.  
 164. Lord, she's pregnant!  
 165. Nanni, do you know you're pregnant?  
 166. Omit.  
 167. Don't touch me!  
 [fol. 126] 168. It's the grace of God!  
 169. Omit.

**End of Reel 2.**

**The Miracle, Reel 3**

188. Cosimino, leave my things alone!  
 188a. The devil got into you . . . you're evil!  
 189. Nanni, come here!  
 190. Omit.  
 191. Don't be afraid, no one will bite you.  
 192, 193. Omit.  
 194. Felice has gone to Maiora.  
 195. Every time he goes, he disappears.  
 196. Later, will you get me some water?  
 197. I can't work, Signora.  
 198. I'll give you something. ♀  
 199, 200. Omit.  
 201. Will you do my wash tomorrow?  
 202. Thank you but I can't work.  
 203. Why not?  
 203a, 204. Omit.  
 205. I worked until two hours before I gave birth  
 206. And I had twins!  
 207. You must be sensible.  
 [fol. 127] 208. Remember, soon you'll have a child.

209. You ought to put something aside.  
 210. This child will have need of nothing.  
 211. I mustn't work . . .  
 212. . . . even if I were to die of hunger . . .  
 213. I must respect the child.  
 214, 215, 216. Omit.  
 217. What honor! You've descended among us mortals!  
 218, 219. Omit.  
 220. We thought you disappeared . . . We thought  
 you shunned us.  
 221. Why didn't you stay among us?  
 222. She's crying now . . . Why?  
 223. She's overcome with emotion . . .  
 224. Omit.  
 225. Do you know whom she thinks she is?  
 226. Don't make fun of her.  
 227. She's out of her mind.  
 228. Poor woman . . .  
 229. Yes, an unfortunate woman.  
 230, 231, 232. Omit.  
 233. I was afraid to come down here . . .  
 234. I was afraid you'd call me crazy!  
 235. It looks well on you . . .  
 {fol. 128] 236. Nanni, they're paying homage to you!  
 237. Cosimino threw me out . . .  
 238. But it is the will of the Lord that I be here, among  
 you.  
 239. To me! . . . This!  
 239a. Yes, to you . . .  
 240. To me! . . . Thank you . . .  
 241. Omit.  
 241a. It fits you well.  
 241b. Omit.

End Reel 3.

#### The Miracle, Reel 4

242. How bad they are!  
 243. My blessed son, Don't fear . . . I'll defend you!  
 ~ 244. My Lord!  
 245. Blessed son! . . . my blessed son . . .  
 246. My holy son . . .

247. I'm not worthy . . .  
 248. I'm but a small creature . . .  
 249. My Lord . . . You help me . . .  
 250. And may Your will be done . . .  
 251, 251a. Omit.

[fol. 129] 252. Help!

- 253, 254, 255. Omit.  
 256, 257, 258, 259. Omit.  
 260. My son!  
 261. My love!  
 262. My flesh!

The End.

[fol. 130-132] IN SUPREME COURT OF NEW YORK

[Title omitted]

#### STIPULATION

The parties hereto stipulate that hundreds of letters, telegrams, post cards, affidavits and other communications were received by the Board of Regents prior to its determination in this matter. These communications were on both sides of the question. It has been felt that no useful purpose would be served by including them in the return, but they are available and the Court may consider them if it so desires.

O'Connor and Farber, Attorneys for Petitioner;  
 Charles A. Brind, Jr., Attorney for Respondents.

[fol. 133] IN SUPREME COURT OF NEW YORK, COUNTY OF  
 ALBANY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS—May 21, 1951

Sirs:

Please take notice that, pursuant to leave granted by an order of the Appellate Division of the Supreme Court, Third Judicial Department, in the above entitled action,

dated and entered on the 18th day of May, 1951, in the office of the Clerk of the Appellate Division of the Supreme Court, Third Judicial Department, the petitioner above named hereby appeals to the Court of Appeals of the State [fol. 134-136] of New York, from the final order of the Appellate Division, Third Judicial Department, entered in the office of the Clerk thereof on the 15th day of May, 1951, unanimously confirming the determination of the Board of Regents of the University of the State of New York, which order rescinded licenses for the public exhibition of the motion picture film entitled "The Miracle," and petitioner appeals from each and every part of said order of confirmation, as well as from the whole thereof.

Dated, New York, May 21, 1951.

Yours, etc., Ephraim S. London, Attorney for Petitioner-Appellant, Office & P. O. Address, 150 Broadway, Borough of Manhattan, New York 38, N. Y.

To: Clerk of the Appellate Division, Third Judicial Department, and Charles A. Brind, Jr., Esq., Attorney for Respondents, State Education Building, Albany, N. Y.

---

[fol. 137] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—THIRD DEPARTMENT

[Title omitted]

ORDER APPEALED FROM

[fol. 138] The above entitled proceeding having been duly brought to argument at the above captioned term and having been argued by O'Connor & Farber, Samuel E. Aronowitz, Esqs., attorneys for petitioner, and Charles A. Brind, Jr., Esq., attorney for respondents, and due deliberation having been had and a decision thereon having been handed down on the 9th day of May, 1951, it is

Ordered that the determination of the respondents be, and the same hereby is, unanimously confirmed with Fifty (\$50.00) Dollars costs and disbursements.

John S. Herrick, Clerk.

A true copy. John S. Herrick, Clerk.

Ent. 5-15-51.

[fol. 139] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION OF APPELLATE DIVISION

FOSTER, P. J.:

This is a proceeding under Article 78 of the Civil Practice Act to review a determination of the Board of Regents of the University of the State of New York which rescinded licenses for the public exhibition of a motion picture film, entitled "The Miracle," on the ground it is sacrilegious.

The picture, produced in Italy, depicts a demented peasant girl tending a herd of goats on mountainside. A bearded stranger appears, garbed in a dress reminiscent of Biblical times. She imagines him to be St. Joseph, and that he has come to take her to heaven. While she babbles about this he says nothing, but plies her with wine, and the implication is left that he seduces her. Later, when her pregnancy becomes known to the villagers, they mock her and place a basin on her head in imitation of a halo. She exclaims at one point as to her pregnancy, "It's the grace of God." She leaves the village to take refuge in a cave, and finally gives birth to a child in the basement of a church which stands on a high hill.

According to the English dialogue, in her babbling to the bearded stranger, she makes these statements: "I'm not well . . . And taking a loaf of bread, he broke it . . . And an Angel of the Lord appeared in his dream and said . . . Joseph, . . . Son of David . . . Have no fear to take Mary as your bride . . . for what has been conceived here . . . St. Joseph . . . Cast aside my body and my soul . . . I'd feel so happy without this weight . . . St. Joseph has come to me . . . What Heaven . . . Heaven [fol. 140] on earth . . . The mad woman has received grace."

On March 2, 1949, the motion picture division of the State Education Department issued a license for the picture with Italian dialogue. Apparently it was never shown pursuant to this license. On November 30, 1950, it was again licensed as a part of a trilogy entitled "Ways of Love," with an English dialogue. After it had been pub-

licely shown under this license the Board of Regents received many protests against its exhibition on the point that it was sacrilegious. A committee of the Regents was requested to view the picture, and after it had reported there was a basis for the claim that the picture was sacrilegious the Commission of Education issued an order requiring the licensees of the film to show cause at a hearing before the same committee why the licenses should not be revoked.

At the hearing before the committee, petitioner, who was the holder of the license last issued, appeared specially and challenged the Regent's authority to proceed in the matter on the theory that it had no power of review under the statute as to a license once issued. The committee reported that in its opinion the Regents had authority to consider whether the film was licensed illegally or not, and recommended that the Board of Regents, as a committee of the whole, view the picture. This action was taken, and after due consideration the Board found the picture to be sacrilegious, and voted to rescind the licenses therefor on February 16, 1951.

Overshadowing all other arguments petitioner contends on this review that censorship of sound motion pictures [fol. 141] is unconstitutional as a previous restraint on freedom of speech and freedom of the press, in violation of the First and Fourteenth Amendments to the Constitution of the United States and to Section 8 of Article 1 of the Constitution of the state. We do not regard such an issue as an open one in this court. Motion pictures have been judicially declared to be entertainment spectacles, and not a part of the press or organs of public opinion; and hence subject to state censorship (*Mutual Film Corporation v. Ohio Indemnity Co.*, 236 U. S. 230). This Court has upheld the power of the state to censor motion pictures (*Pathé Exchange, Inc., v. Cobb*, 202 App. Div. 450), a decision which was affirmed by the Court of Appeals (236 N. Y. 539). Strong criticism has been voiced against the distinctions made between movie films and freedom of expression otherwise guaranteed (Cornell Law Quarterly, Vol. 36, No. 2, p. 273); and some dicta would seem to indicate a change of viewpoint (*United States v. Paramount Pictures*,

331 U. S. 136, 166). But despite the enlarged scope of motion pictures as a medium of expression in recent years, and the addition of sound dialogue, the latest authoritative judicial expression which bears directly on the subject still recognizes the distinction (*Rd-Dr Corporation, et al., v. Smith*, 183 Fed. Reporter [2nd series] 562; certiorari denied 340 U.S. 853). In view of this situation it is not appropriate for us, as an intermediate court, to re-examine the issue.

In addition to arguing against the principle of censorship generally, petitioner also argues that Section 122 of the Education Law, which bars the licensing of a motion picture [fol. 142] deemed sacrilegious, is an unconstitutional exercise of legislative power. This argument proceeds on the theory that no thing can be deemed sacrilegious as applied to a motion picture without impinging on the constitutional guarantee of freedom of religion. Petitioner cites the fact that what may be sacrilegious to one group of citizens may not be so as to other groups; and hence it reasons that no enforceable meaning can be given to the term for the purpose of censorship. The Board of Regents based its revocation solely on the ground that the picture is sacrilegious; that it parodies in effect the Immaculate Conception and the Divine Birth of Christ as set forth in the New Testament. By millions of Christians these doctrines are held sacred, and any profanation thereof regarded as a sacrilege. Concededly there are other groups who do not accept these beliefs. May the state bar on the ground of sacrilege a motion picture that profanes the religious beliefs of one group, however large, when the profanation is not common and universal to all groups? Assuming the validity of the distinction we have already noted between motion pictures and other organs of expression we think the answer to this question lies in the affirmative.

The term "sacrilege," according to modern semantics, means the violation or profanation of sacred things. It is derived from the Latin word "sacrilegium," which originally meant merely the theft of sacred things; but its meaning has since been widely extended. Even as far back as Cicero's time it had grown in popular speech to include

any insult or injury to things deemed sacred, Encyclopaedia [fol. 143] Britannica, Vol. 19, p. 803). Obviously the legislature used the term in its widest sense, and we think it was intended to apply to all recognized religions; not merely to one sect alone. Any construction which denoted a preference for one sect would be inconsistent with the constitutional mandate of complete separation between church and state. Support for this view may be found in another field. For instance, it is a criminal offense in this state to present an exhibition in which there shall be a living character representing the deity of any known religion (Penal Law, Section 2074). In a sense this statute also impinges on freedom of expression so far as religion is concerned, yet no one, that we can discover, has challenged the power of the state in the interests of public peace and order to enforce it. We think the state has the same power for the same reason to exercise a previous restraint as to motion pictures that may fairly be deemed sacrilegious to the adherents of any religious group. The exercise of such a power is directly related to public peace and order, and unless clearly in conflict with a constitutional prohibition it should not be denied.

We fail to see how such restraint can be construed as denying freedom of religion to anyone, or how it raises the dogma of any one group to a legal imperative above other groups. As we construe the statute all faiths are entitled to the same protection against sacrilege. This is not to say that full inquiry and free discussion, even to the point of attack, may not be had with regard to the doctrines of any religion, including Christianity, by those [fol. 144], who are freethinkers and otherwise (*Commonwealth v. Kneeland*, 20 Pick. 206; *Cantwell v. Connecticut*, 310 U. S. 296). However, motion pictures, staged for entertainment purposes alone, are not within the category of inquiry and discussion. A view of the picture in question would convince any reasonable mind that it was conceived and produced purely as an entertainment spectacle, and not as a vehicle for inquiry or discussion as to the merits of any religious dogma. The statute does not muzzle either free speech or a free press. All it purports to do is to bar a visual caricature of religious beliefs held

sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom. It should be added in connection with this point that news films, scientific and educational films, are expressly exempted from censorship (Education Law, Section 123).

Aside from all this petitioner contends that the Board of Regents was without power to rescind a license granted by the motion picture division, because the statute does not expressly provide for a review by the Regents where a license is denied (Education Law, Section 124). The Regents take the view that in rescinding the licenses they were merely correcting the illegal acts of a subordinate body, and that as the head of the Department of Education and charged with the enforcement of censorship provision~~s~~ of the statute they had the power to do so.

The motion picture division of the Department of Education is successor to the Motion Picture Commission, an independent body established in 1921 when the state first undertook the censorship of motion pictures. The latter [fol. 145] was abolished in 1926 and its functions transferred to the Education Department (L. 1926, ch. 544). In 1927 the law was again revised and provided for the continuation of a motion picture division within the Education Department in language now contained in Section 120 of the present Education Law. This section provides in part:

"There shall continue to be in the ~~education~~ department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees."

Section 121 of the same statute authorizes the Regents to establish offices and bureaus for the reception and examination of films.

Section 122 provides for censorship in these words:

"The director of the division or, when authorized by the Regents, the officers of a local office or bureau shall [fol. 146] cause to be promptly examined every motion picture film submitted to them as herein required and unless such film or a part thereof is obscene, indecent, immoral, inhuman, *sacrilegious*, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor.  
\* \* \* (Italics supplied.)

Section 124 authorizes a review by the Regents or a committee thereof, at the behest of an applicant in case a license is denied by the motion picture division.

Section 132, however, empowers the Board of Regents in the broadest of language to enforce the provisions and purposes of the entire article relating to the motion picture division.

These brief references to the statute clearly indicate that the motion picture division is a subordinate body of the Education Department under the control of the Board of Regents. We think it equally clear that the latter has the power to correct or rescind any illegal action taken by its motion picture division. If this is not so then the language of Section 132 of the statute must be held meaningless, for one of the provisions and purposes of the statute is to prevent the licensing of a motion picture that is immoral or sacrilegious. If the motion picture division was an independent body, then undoubtedly the maxim cited by petitioner, "*expressio unius est exclusio alterius*," would apply; the grant of an express power to review in one case not specified. The subordinate position of the motion picture division and the supreme responsibility of the Regents to enforce the provisions and purposes of the statute preclude the application of the maxim here.

[fol. 147] - We may add that it seems most unlikely from a practical viewpoint that the legislature intended to leave the authorities helpless in a case where through some mis-

conception or inadvertence on the part of the motion picture division a film was illegally licensed. Such would be the result, for instance, where an immoral picture happened to slip by the motion picture division through inadvertence or otherwise. In such a case it would have to be held, if petitioner is right, that the Regents could not correct the situation; and on the other hand, a criminal prosecution would be impossible because the film has been licensed (Penal Law; Section 1141). Such a stalemate would be repugnant to common sense, and every implication is against it. It furnishes ground for the belief that the legislature gave no specific grant of power to the Regents for a review when a license was granted because none was considered necessary; the power to correct was inherent in the statute.

There remains the issue as to whether the Regents acted arbitrarily and capriciously in the matter. Once the validity of the principle of censorship is admitted the issue in each case becomes one of judgment; in fact, that is one of the gravest arguments against the principle. The record before us indicates varying views as to whether the picture in question is so offensive to large groups within the Christian sect as to justify a finding that as to them it is sacrilegious. This conflict of views is proof that the issue is one of judgment to be resolved by the administrative body which has it in charge. The text and content of the picture itself, together with the complaints received, con [fol. 148] stituted substantial evidence upon which the Regents could act. Under the familiar rule, applicable to all administrative proceedings, we may not interfere unless the determination made was one that no reasonable mind could reach. While some of us feel that the importance of the picture has been exaggerated, we cannot justly say that the determination complained of was one that no reasonable mind would countenance.

The determination therefore should be confirmed with \$50 costs and disbursements.

[fol. 149] COURT OF APPEALS OF THE STATE OF NEW YORK  
 [Title omitted]

STIPULATION WITH RESPECT TO EXHIBITS—May 15, 1951

It is hereby stipulated and agreed that the motion picture film, "The Miracle," shall be deemed a part of the Case on Appeal to the Court of Appeals herein, and shall, if request is made, be exhibited to the Court of Appeals on the argument of this appeal.

It is further stipulated and agreed that Exhibits 4 to 78, [fols. 150-151] returned with Respondents' Answer in the Appellate Division of the Supreme Court of the State of New York, for the Third Department, and omitted pursuant to agreement from the printed record submitted to that Court, shall be omitted from the printed Case on Appeal to the Court of Appeals, but without prejudice to the rights of the parties to refer to the said exhibits or to submit the originals or copies of any or all of said exhibits upon the argument of this appeal, with the same effect as if printed in the Case on Appeal.

Dated, May 15th, 1951,

Ephraim S. London, Attorney for Petitioner-Appellant; Charles A. Brind, Jr., Attorney for Respondents.

[fol. i]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

DESCRIPTION OF EXHIBITS, AND EXCERPTS

*Exhibit*

*No.*

1. Statement by Member of the Italian Ministry to the effect that "The Miracle" was approved by the Italian Government for public presentation (Record on Appeal, fol. 217).
2. Statement of President of the Italian Motion Picture Industry to the effect that government approval of the film could not have been secured if the film was considered blasphemous (Record on Appeal, fol. 224).

*Exhibit*

No.

3. Statement by Director of the Venice Film Festival that the film was accepted there and would have been rejected if considered blasphemous (Record on Appeal, fol. 232).
4. Article in *Life Magazine*:

"The Vatican newspaper, *L'Osservatore Romano*, in reviewing *The Miracle* made no criticism of it on religious grounds . . . ."

5. National Board of Review Weekly Guide,—listing "Ways of Love" as a starred, selected feature that is especially worth seeing.
6. Article in a symposium in *The Churchman*, including the report of a telegram sent by 30 clergymen and laymen to the Board of Regents requesting it to uphold the decision of the Motion Picture Board.

[fol. ii]

"I have seen *The Miracle* and have found nothing in it that even remotely suggests an insult to religion or contempt of womanhood, Italian or other. On the contrary, I found this picture to be in many respects a very remarkable example of artistic, deeply moving screen-art."—Rev. Dr. Karl M. Chworowsky.

"I seldom attend a movie. But if I could see pictures like *The Miracle*, I might become a movie fan."—Samuel G. Inman, President of World Press.

"After seeing *The Miracle* I am all the more convinced that the Board of Regents of the State of New York should not revoke the license of this controversial Italian film."—Stanley I. Stuber, Chairman, Commission on Religious Freedom, Baptist World Congress.

"It is hard to conceive of what harm Rossellini's *The Miracle* can do 'good' Roman Catholics . . . ."—John F. Davidson, St. George's Church.

***Exhibit.*****No.**

7. Letter of the Rev. John Dillenberger, Assistant Professor of Religion and Minister of the Evangelical-Reformed Church:

"Although the plot of the movie is possible only because of Christianity, it has not been stolen from the Christian context; it is simply a reaction to it without any malicious intent. No aspersions are cast on any religious body. There will be some who will find it offensive; in my judgment, they are unduly sensitive and read more into the picture than is warranted."

[fol. iii]

8. Letter of the Rev. F. T. Schumacher, Minister of the Evangelical Reformed Church and Instructor of Religion:

"The movie makes it quite clear that it is dealing with the tragic situation of a demented person and that consequently her religious faith is by no means indicative of that of normal people. No one could assume otherwise, unless they brought to the performance a previously conceived prejudice. In that case the movie is not the cause, but the victim of willful misuse."

9. Letter of the Rev. H. C. DeWindt, Minister of the West Park Presbyterian Church:

"I have this day viewed the film 'The Miracle' and I wish to say that I found nothing whatever in the picture that was sacrilegious or immoral to the views held by Christian men and women. • • •

I should not hesitate for one moment to take my own son or daughter to see this picture. And I would take them in the assurance that far from being influenced in any evil way by this picture, they would find in it some inspiration and help."

*Exhibit**No.*

10. Affidavit of the Rev. L. Knester, Minister of the First Reformed Church:

"There is no true sacrilegious note, but rather, a vivid example of how people turn to the Church, with great feeling, when they are alone with the great problems of life."

[fol. iv]

11. Letter from Rev. N. R. Farman, Jr., Pastor of the Congregational Church:

"Having just now seen the film in question, I find in it nothing which struck me as a minister as sacrilegious."

12. Letter from Rev. W. J. Beeners:

"I have seen 'The Miracle' and found in it no reason for the censorship being urged upon it. The film is unquestionably one of unusual artistic merit, and I myself would have deplored it had I been denied the right to see it merely because of the objection of a minority pressure group."

13. Letter from the Rev. A. J. Penner, Minister of the Broadway Tabernacle Church:

"I am a Congregational minister and Pastor of the Broadway Tabernacle (Congregational) Church in New York City. I have seen 'The Miracle' and have found it in no sense sacrilegious."

14. Petition from 10 Clergymen to the Board of Regents:

"The attempt by private pressure groups to force banning of the film 'The Miracle' is an unwarranted interference in the adequate censorship procedures established by the Law of the State of New York."

*Exhibit**No.*

15. Letter from Rev. L. H. Walz, Minister of the Fifth Avenue Presbyterian Church:

"I found it interesting and without trace of blasphemy, but not of such stature as to stir me one way or the other in normal circumstances."

[fol. v]

16. Letter from the Rev. K. D. Barringer, Minister of the First Methodist Church:

"Last evening I had the real privilege of witnessing a really great motion picture, 'The Miracle.' It was the most vivid and realistic picture I had ever seen in my life. \* \* \* I would highly recommend it for showing throughout America. There seems nothing in the picture that appears sacrilegious. My own religious convictions were not offended, and I cannot see where the average Catholic layman would revolt against such a presentation also."

17. Letter from Rev. W. H. Stevens, Jr., Minister of the Zion Methodist Church:

"I saw 'The Miracle' at a private showing in Boston last night. It was not sacrilegious, nor was it an indictment of any womanhood. It was an artistic portrayal of an insane woman's religious fixation. It does portray man's inhumanity to man."

18. Letter from Prof. John E. Smith, of the Department of Philosophy and Religion, Barnard College:

"Despite these reactions to the film, I found nothing whatsoever 'sacrilegious' in it and I can only report great surprise and some bewilderment that it is being objected to on such grounds."

**Exhibit****No.**

19. Letter from the Rev. R. E. Haynes, Minister of St. Andrew's Methodist Church:

"I saw the moving picture 'The Miracle.' I see nothing in the film that should necessitate a censorship of it."

[fol. vi]

20. Letter of M. E. Bush, Director of Adult Education and Social Relations, American Unitarian Association:

- "First, I found nothing in the picture as presented at that showing which I believe should or could be construed as sacrilegious. For my own part, I saw nothing in the picture which I could construe as offensive on religious grounds. It is the story of an unfortunate woman whose delusions took a form undoubtedly suggested by certain concepts in the Christian tradition, but the picture made it very clear that the woman was a victim of delusions and I cannot see that the picture has the effect of belittling or ridiculing anyone's religious faith."

21. Letter of M. Schneider, Advisor on Religious Affairs, Barnard College:

• • • the story of what happened in the religious workings of an almost insane mind can have no other significance than that of being the story of what happened in the religious working of an insane mind. To draw any other meaning from it, seems to me to be an unnecessary and laborious attempt to draw profound meanings from something meant to be an artistically dynamic and creative portrayal, which I believe it to be. As such, I cannot believe that it fights any doctrinal or theological battle. Surely this is a question where the liberty of religious choice operates."

[fol. vii]

*Exhibit*

No.

22. Letter of S. L. Terrien, Presbyterian Minister:

"This is to express to you the serious concern shared by many who have seen the film 'The Miracle' and who believe there is in it nothing offensive or blasphemous."

23. Letter of Prof. P. Lehman, of Princeton Theological Seminary:

"In my judgment, *The Miracle* cannot be regarded as sacrilege. It does not confuse human things with divine things. It is not irreverent for it neither parodies nor depreciates the relations between God and man."

24. Letter of Mrs. E. Pfluke, Jr., Director of Christian Education, First Methodist Church:

"In regard to the film, 'The Miracle' which I previewed last evening, I can see nothing actually sacrilegious about it if we consider the whole picture."

25. Letter of E. Darling, Editor of *The Christian Register*:

"In my judgment, there is nothing even faintly sacrilegious anywhere in the film."

26. Petition of Liberal Ministers' Club of New York, signed by 39 ministers and religious leaders, including the Rev. Pierre Van Paassen, Jerome Nathanson and Henry Neumann, leaders of the Ethical Culture Society:

"We believe that man is a free creature, possessed of freedom of will, and that no pressure group has the right to rob him of the opportunity of making choices for himself in such a matter as viewing a motion picture like 'The Miracle.'"

[fol. viii]

**Exhibit  
No.**

27. Letter of Prof. L. B. Holland, Princeton University:

"In its parts and in its entirety, the film tells a touching human story and it does this with eminent good taste and fine artistry. If this movie is withheld from New York audiences because of the demands and 'declarations' of a pressure group, the ~~Regents~~ will have dealt a foul blow to free expression and democracy which will have deplorable repercussions not only in this country but abroad."

28. Letter of E. J. Smythe, Editor of the *Protestant Statesman & Nation*:

"The appeal to 'Boycott' the moving picture titled 'The Miracle' by the Roman Catholic Cardinal is both dangerous and unAmerican, censorship in any form by any self appointed group, whether it be Racial, Religious or political is basically unsound . . . ."

29. Letter of Rev. G. F. Weary, Minister of The North Shore Unitarian Society:

"For my part I did not find 'The Miracle' in any way offensive."

30. Letter of H. A. Culbertson, Director of Christian Education, Second Congregational Church:

"I have seen the picture *The Miracle*, and wish to report that I see nothing sacrilegious about it. I do not feel that any doctrine of the Roman Church is being refuted, nor do I feel that any religious concept is in danger so far as this picture is concerned."

[fol. ix]

31. Letter of Prof. H. T. Kerr, Jr., Princeton Theological Seminary:

"It is impossible to know what Mr. Rossellini had in mind by his picture, but I am struck by certain

**Exhibit****No.**

things that appeared to me significant. The mad peasant, for all her indiscretions, is a very devout person with the kind of unsophisticated faith that the Church has always commended; the suggestion that a poor ordinary human being might be elected by God as the recipient of His special grace is strikingly in harmony with the 'Magnificat' (Luke 1:46-45) . . . . .

## 32. Letter of Prof. H. H. Wilson, of Princeton University:

"Having seen this film I find it incomprehensible that any religious organization should characterize it as sacrilegious or blasphemous. It is a powerful, symbolic, deeply religious treatment of a theme common in the folk tales of many countries. Far from finding the picture to be irreligious, I consider this profoundly moving story to be a sympathetic portrayal of the meaning of religious faith for a tormented woman isolated from human companionship."

## 33. Letter of M. A. Hall, Professor of Department of Politics, Princeton University:

"The Constitutional principle which separates church and state works both ways: society, organized politically, cannot impose itself on religious practice, but neither can a church impose itself on political [fol. x] processes in the interests of its own doctrine. Thus, when the Catholic Church interferes with film licensing procedures on the grounds of 'blasphemy', it commits a kind of blasphemy against the very principle on which depends its free existence."

## 34. Letter of Prof. W. T. Stace, Department of Philosophy, Princeton University:

" . . . No story, considered simply as a narration of facts about the actions of human beings, can be in itself blasphemous or immoral. The blasphemy or immorality, if it exists will always lie in some

*Exhibit**No.*

interpretation suggested by the way in which the story is told. \* \* \* *The Miracle* tells the story of a pious but half-witted woman who becomes pregnant by a man whom she believes to be St. Joseph, and who then imagines herself to be the Virgin Mary. Since this is a possible human fact, to relate it cannot be sacrilegious in itself. The only possible question concerns the interpretation suggested by the manner or presentation. If the film were intended to cause people to scorn or ridicule the doctrine of the Virgin Birth, or to disbelieve it, it could reasonably be called sacrilegious from the point of view of an orthodox Christian. But there is no hint of any such suggestion in the film."

• 35. Affidavit of Rabbi I. B. Hoffman, Religious Counselor at Columbia University:

\* \* \* Moreover, the question of sacrilege in regard to one particular theological view is not central to the issue of banning the film for Americans [fol. xi] of all faiths. The real question is censorship. \* \* \* In these days especially, it would seem to me that holding fast to our tradition of freedom is the most important consideration. Risks are involved in almost any course of action. Freedom for artistic, intellectual and religious differences in the theater and on the screen is a precious inheritance which we must uphold even though there may be risks involved."

36. Letter of S. Basescu, Department of Psychology, Princeton University:

"I am thoroughly opposed to any censorship of this film. I have seen the film. I feel that the only basis for branding this film 'sacrilegious' is one's personal doubt as to the validity of one's expressed religious beliefs."

*Exhibit**No.*

## 37. Letter of Prof. W. F. Galpin, Syracuse University:

"In the instance now before the public it would seem to me that no great harm can result from a public showing of 'The Miracle'. Far greater harm and injury to democratic rights and freedom will result if the action of the State Board of Censors in approving of this film, is revoked."

## 38. Letter of Prof. G. A. Barrois, Princeton Theological Seminary:

"I have seen the motion picture 'The Miracle', and I do not find anything blasphemous or sacrilegious in it. It implies no insult to religion, intentional or not intentional. It contains no attack [fol. xii] against consecrated individuals, or groups of individuals, or against consecrated things (using here the word *consecrated* in the restricted meaning of Roman Catholic theology and Canon Law)."

## 39. Affidavit of Prof. H. W. Janson, New York University:

"A great and profoundly moving motion picture. It is inconceivable to me how it could possibly be interpreted as blasphemous or in any sense anti-religious."

## 40. Letter of J. K. Sefcik, Princeton Theological Seminary:

"I saw the movie entitled *The Miracle* last night, and to my mind, there is nothing sacrilegious in it. \* \* \*

The experience of Nanni can be as truly a religious experience as Paul's conversion on his way to Damascus. To judge it as not thus, is to judge the workings of God."

## 41. Letter of E. W. Mills, former president, National Conference of Methodist Youth:

" \* \* \* But I cannot see how this picture could be considered blasphemous or even uncomplimentary toward any religious group."

*Exhibit  
No.*

42. Letter of J. V. Watson, Secretary, Protestant and Other Americans United for Separation of Church and State:

" \* \* \* as a practicing Christian and a believer in the virgin birth of Jesus I could see absolutely nothing in the picture which could possibly offend anyone's religious convictions."

[fol. xiii]

43. Letter of F. M. Dunn, Jr.:

"It has been charged that *The Miracle* is sacrilegious. If sacrilegious means attacking the doctrine of some faith, or if it means holding some tenet in ridicule, then I must state truthfully that *The Miracle* can in no sense be described by this word."

44. Statement of Mrs. E. Cobb, Writer, Educator:

"I felt that this movie was a really profoundly impressive statement of the power that religion can give to a deficient and helpless personality."

45. Joint letter of Mary M. Bigelow, Psychologist, and J. H. Bigelow, Mathematician, of The Institute for Advanced Study:

"We consider this play to be quite opposite to sacrilegious and see no reason whatever that its showing should be restricted in any way."

46. Statement of Prof. H. A. Singer, New York University:

"I, Dr. Henry A. Singer, having seen the motion picture, 'The Miracle' find nothing objectionable, blasphemous or censorable in the film as shown."

47. Letter of Mrs. Howard Mumford Jones:

"I saw nothing irreligious in it. On the contrary, the deep devotion of the woman, her profoundly ingrained mysticism, her love of God, of the Saints, her certainty that they would look after her and raise

*Exhibit**No.*

her from her lowness all seemed to me exceptionally religious in content."

[fol. xiv]

48. Letter of Mrs. H. B. Brinig, Director of Church Activities, Marble Collegiate Church:

"I did not interpret it as an attack upon the Christian Faith nor do I believe it should be suppressed by the force of any pressure group even if it were. As a Christian, I'm sure it is up to us to make the values of our religion so apparent and workable that such a movie would easily be seen as puerile and irrelevant by comparison."

49. Letter of Alfred Cole, Department of Homiletics, Tufts College, School of Religion:

"so far as any sacrilege was concerned, I could not find any whatsoever."

50. Letter of the Rev. B. O. Waterman, Minister of Mount Vernon Larger Parish:

"The 'Miracle' is apparently a good film and should be viewed with an open mind . . . ."

51. Letter of E. F. Widermuth:

"Freedom of religion does not confer greater rights upon one sect or creed than it does upon all others anymore than it grants less rights to one sect or creed than it does upon all others. No organized religion has a monopoly upon virtue, righteousness or morality."

52. Letter of G. Campbell:

"Frankly, I was surprised to think that anyone would discover in this film anything sacreligious. It is a simple and moving story, but I can see no religious controversy contained within it."

[fol. xv]

*Exhibit**No.*

- 53a. Letter to the *Herald Tribune* from Alfred H. Barr, Jr., Director of Museum of Modern Art:
- o b. Letter of Kathleen Rogow, of the Roman Catholic faith:

“‘The Miracle’ contains nothing offensive to Catholicism.”

- c. Letter of Jeremiah F. Carroll, of the Roman Catholic faith
- d. Letter of Tiffany Thayer, writer
- e. Letter from Rev. B. J. Bamberger, Rabbi of West End Synagogue:

“I have seen *The Miracle* and find in it no threat to the general welfare. Whether it is saereligious can be decided only in terms of a specific theology. For the State to intervene in determining such a question, on which men of the highest integrity and piety disagree, is not only a violation of Constitutional principles, but a serious threat to the independence of all religious agencies.”

54. Article by Otto L. Spaeth, of the Roman Catholic faith, Director of the American Federation of Arts:

“At the outbreak of the controversy, I immediately arranged for a private showing of the film. I invited a group of Catholics, competent and respected for their writings on both religious and cultural subjects. The essential approval of the film was unanimous.

There was indeed ‘blasphemy’ in the picture—but it was the blasphemy of the villagers, who stopped at [fol. xvi] nothing, not even the mock singing of a hymn to the Virgin, in their brutal badgering of the tragic woman. The seething indictment of their evil behavior, implicit in the film, was seemingly overlooked by its critics.”

*Exhibit**No.*

55. Excerpt from a sermon of the Rev. Karl M. Chworowski:

"I sat through the performance with a growing sense of the reverence and beauty that pervade the story, and at no time did I find the slightest urge either to think unkindly of Italian womanhood or of the Catholic religion."

56. Text of radio program of "Jewish Life" broadcast over Station WGMS, Washington:

"Now the banning of 'The Miracle' seems to me unnecessary and unwise. Let's have faith in the basic tolerance of Americans. Let's let people see 'The Miracle' and decide for themselves what it says."

57. Text of radio broadcast by Bill Leonard over Station WCBS, New York:

"Before Mr. McCaffrey decided this wasn't a proper thing for New Yorkers to see I saw it. I found it powerful and moving: bitter—but still a story of great and real love. Sacrilegious is a tough word. Its use in connection with *The Miracle* never occurred to me."

58. Statement to the Press of Rev. J. Spencer Kennard, Jr.:

"Nobody but a bigot could see blasphemy in such a film. The day when stark realism of this sort cannot be seen on the screen we will have returned to the mentality of the Middle Ages."

[fol. xvii]

59. Statement of Rev. Donald Harrington, Minister of the Community Church:

"I say, after careful study, and in all humility, that I see nothing sacrilegious in it. It is a touching and simple story of human life which seems to me to say that every birth of a child is a miracle of transforming wonder, even when it occurs under the direct

*Exhibit.*

No.

circumstances, and that merciful and sensitive man should so regard it."

60. An article by Robert Hatch in *The New Republic*:

"To blaspheme is to revile or curse the Deity and 'The Miracle,' whatever its shortcomings, is a powerful statement of the mercy and peace that God bestows on his most unhappy and forsaken children."

61. An article by George Seldes in *The Nation*:

"To be sacrilegious, the picture must hold religion up to contempt; the law does not say that a picture must be respectful to all the tenets of any single sect or church—it must respect religion."

62. Letter from Allen Tate, poet and critic, of the Roman Catholic faith:

"To my mind, this action is a violation not only of the relation of church and state but of the great Catholic moral and intellectual tradition, and points also to a latent heresy within the church that has been variously known as Puritanism and Jansenism. [fol. xviii] \* \* \* When we remember that the works of Dante Alighieri were publicly burned by a fourteenth-century Pope, the weapon of suppression begins to look ridiculous."

63. Article by Harold Clurman, in *Tomorrow*:

"*The Miracle*, while strangely impersonal and unsentimental, is deeply religious. One might say that it is compassionate without tears, Christian without religiosity. The church we see in the picture is the real church, as the Italian people know it."

64. Editorial from the Wilmington, Del., *News*:

"Metropolitan film critics, while recognizing that 'The Miracle' might appear sacrilegious to some persons, were for the most part inclined to feel that it

*Exhibit  
No.*

it was reverent in effect and in intent. Some of them even said that it contained high moral and spiritual values. Certain Protestant groups have expressed similar opinions. \* \* \*

If there were widespread or universal agreement that 'The Miracle' deserved that label, no question would arise. But when religious leaders disagree, it would seem that a secular body like the Board of Regents might well assume that a reasonable doubt exists. Censorship is easily abused, and such abuse violates fundamental American principles. It certainly should not be exercised where no clear-cut case exists, or in response to group pressures."

[fol. xix]

65. Editorial, *New York Times*:

"But when there is doubt, it seems to us essential to lean away from censorship. The contrary course can tend too easily toward thought control. These are dangerous times, and any move in that direction would make them only the more dangerous."

66. Report in the *New York Post* with petition to the Regents signed by critics, writers, editors, composers, etc.:

"While groups protesting showing of the film have every right to persuade others not to see the film, they have no right to impose their views upon the rest of the population of the state. Revoking licenses at the instance of private pressure groups would permit them to dictate what other Americans may or may not see or hear."

67. Article by Alice Hughes in the *Reading; Pa. Eagle*:

"But in a country where separation of Church and State and respect for freedom of religion are fundamental by Constitution it seems wrong for anybody, even the License Commissioner, to assume authority to prevent the showing of any film purely on sec-

## Exhibit

No.

tarian religious grounds. Those to whom the subject seems blasphemous can stay away. As no voices have risen against 'The Miracle' for any other reason, its suppression seems unwarranted."

[fol. xx]

68. Report from the *New York Daily News* on "The Miracle":

"'The Miracle' is artistic and beautifully done by both the star and the director. Love here is defined as 'ardent affection, passionate attachment, men's adoration of God, gratification, devotion.'"

69. Report of sermon delivered by Rev. P. A. Wolfe, Minister of the Brick Presbyterian Church:

"... looking from my Presbyterian background, I did not find it sacrilegious."

70. Article in *The New York Post* reporting the receipt of many letters by Mayor Impellitteri, which letters protested against the banning of "The Miracle"

71. Newspaper reports of protest to the Board of Regents against the proposed ban of "The Miracle"

72. Newspaper reports of protest to the Board of Regents against the proposed ban of "The Miracle"

73. Newspaper reports of cable sent by Roberto Rossellini, producer of the "The Miracle" to His Eminence, The Cardinal Spellman:

"In 'The Miracle' men are still without pity, because they still have not come back to God, but God is already present in the faith, however confused, of that poor, persecuted woman, and since God is wherever a human being suffers and is misunderstood, 'The Miracle' occurs when at the birth of the child the poor, demented woman regains sanity in her maternal love."

[fol. xxi]

*Exhibit  
No.*

74. Column by Max Lerner, in *The New York Post* on the censorship of "The Miracle":

"Is this blasphemy? Only if you stretch the story into an effort to travesty the original one of Mary and Joseph and Jesus. If this were the intent, it is hard to believe that the picture would have been so well received in Italy itself, whose people have a great religious tradition."

"The real blasphemy is that of a little man who seems for the moment to have blundered into assuming godlike powers of decision for the rest of us."

75. Editorial in the Washington, D. C., *Post* on the banning of "The Miracle":

"New Yorkers ought to be free to take it or leave it as they choose. This freedom of choice, which is the essence of a free society, has now been destroyed—we hope only temporarily—by the caprice of a single official."

76. Editorial in the *Boston Herald* on the banning of "The Miracle":

"The blasphemy charge, therefore, appears to be quite absurd."

77. Article in the *New York Times* on the condemnation of "The Miracle":

"But the basic consideration in the case of the pictures named above—and indeed, in the case of any picture which some element or groups may oppose—is whether real freedom of expression on the screen [fol. xxii] is sincerely desired and whether the cause of this freedom is worth enduring offense to maintain. For it goes without too much saying that freedom is restricted and imperiled by every successful endeavor to suppress or willfully expurgate a film for any

*Exhibit*

No.

cause whatsoever, except patent and gross obscenity.

" \* \* \* the individual who suspects that his sensibilities may be offended by a particular picture can simply stay away. That, in the last analysis, is the best kind of censorship."

78. Report in the *New York Times* of sermon of Rev. Donald Harrington, Pastor of the Community Church:

"The right to speak includes the right to hear, and freedom of the screen is guaranteed to all Americans under the freedom of speech clause of our Bill of Rights. This means that every citizen has the right to decide for himself which films he shall see or shall not see, and no hierarchy nor church nor private group of any kind has the right, by official action, to rob him of this choice."

[fols. 1-5]

**EXHIBIT 6**

(The Churchman)

The Cardinal: Critic and Censor

By the Rev. Dr. Karl M. Chworowsky

Francis Cardinal Spellman issued a statement calling upon his fellow-Catholics in the United States to boycott the Film *The Miracle*, then running at the Paris Theatre, Manhattan, and to oppose the showing of this film wherever it might appear.

*The Miracle* is the third part of a film-trilogy entitled *Ways of Love*. It was promptly condemned by the (Catholic) National Legion of Decency as a "sacrilegious and blasphemous mockery of Christian religious truth." On December 23 its showing at the Paris Theatre, Manhattan, was temporarily stopped by the New York City Commissioner of Licenses, who pronounced it "a blasphemous [fol. 6] affront to a great many of our citizens." A few

days later, a Justice of the Supreme Court restrained the commissioner from stopping the picture, claiming that the state law demanded this decision.

The cardinal in his statement read at all masses in St. Patrick's Cathedral, Sunday, January 7, severely criticized the state board of censorship, officially known as the Motion Picture Division of the State Education Department, for approving the picture, and condemned the picture as "art at its lowest," as "diabolical deception at its depth," as "a vile and harmful picture," as "a despicable affront to every Christian . . . a mockery of our faith," and as "a vicious insult to Italian womanhood." Further passages from the cardinal's statement, that lose nothing by being here reported out of their context, read: "this picture blasphemously and sacrilegiously implies a subversion to the very inspired word of God. . . . The perpetrators of *The Miracle* unjustly cast their poisonous darts of ridicule at Christian faith and at Italian womanhood, thereby dividing religion against religion and race against race. . . . We are confident that all good Americans will unite with us in this battle for decency and Americanism."

I have seen *The Miracle* and have found nothing in it that even remotely suggests an insult to religion or contempt of womanhood, Italian or other. On the contrary, I found this picture to be in many respects a very remarkable example of artistic, deeply moving screen-art. Certainly the portrayal of the chief character of the play by the distinguished Italian actress Anna Magnani was nothing short of virtuous [fol. 7] at its best. As for the story itself, I know of no finer plea made for its legitimate use as material for film or stage than the message sent by Roberto Rossellini himself to Cardinal Spellman in defense of *The Miracle*. This message is worth quoting: "In *The Miracle* men are still without pity because they still have not come back to God, but God is already present in the faith, however confused, of that poor, persecuted woman; and since God is wherever a human being suffers and is misunderstood, *The Miracle* occurs when at the birth of the child the poor, demented woman regains sanity in her maternal love."

Film critics will find points of disagreement regarding certain details of the script, the production, and the direc-

tion of *The Miracle*; but I am convinced that most of them will agree that here the genius of Rossellini has again produced a masterpiece of the contemporary cinema.

I find it difficult to imagine any person of culture and esthetic appreciation leaving a showing of *The Miracle* with anything but a quickened sense of his emotions of pity, compassion, and understanding not only for the poor, mentally deranged woman who is the chief figure of the story, but for all poor, ignorant, superstitious and mistreated souls that fall easy prey to the ridicule and contempt of their misguided neighbors. I cannot conceive of any intelligent member of *The Miracle* audience even remotely gaining the impression that in this picture Catholicism was being attacked or that a slur against religion in general was intended.

Of course, I grant the cardinal and his subordinates and colleagues every right to criticise what they find objectionable and what they hold to be dangerous to the moral and [fol. 8] spiritual health of American Catholics. But it would seem to me that in this particular instance the cardinal has gone just a little too far beyond the right he has as an American citizen and as a churchman to voice his opinions and objections, for in his blast against *The Miracle* he presumes to speak not only for the Catholics of the United States but for non-Catholics as well; this he does when he calls upon "all people with a sense of decency" to refrain from seeing *The Miracle*. The arrogance of his presumption that only they who agree with him are "decent" is aggravated by his use of the phrase "we, as the guardians of the moral law must summon you etc."

As a religious liberal and a Protestant clergyman I take emphatic issue with the cardinal when he glibly assumes that he and his fellow-Catholics are "the guardians of the moral law," and I further resent his statement to the effect that "the perpetrators of *The Miracle* unjustly cast their poisonous darts of ridicule at Christian faith and at Italian womanhood, thereby dividing religion against religion and race against race." I maintain that if any such "dividing against religion and race" has been done in connection with the controversy over *The Miracle* in New York City, this has been done by the cardinal himself when self-righteously and

arrogantly he refers to the Catholics of America as "the guardians of the moral law." I have no reason to believe that even all American Catholics will follow the cardinal in his crusade against *The Miracle*, which I hold to be not only innocent of the charges hurled against it by a high ecclesiastic but also an artistic attraction for large audiences of [fol. 9] perfectly moral, decent, and religious New Yorkers. And I wonder whether the cardinal has never stopped to realize that by his blast against *The Miracle* he is driving thousands of the curious to see it, while silence on his part might have had just the effect he desired, viz. to reduce attendance at the Paris Theatre and elsewhere where this picture may be shown.

This incident is just another proof of the correctness of the charge made by Paul Blandshard in his book *American Freedom and Catholic Power* when in the chapter on "Censorship and Boycott" he draws a very realistic picture of what Catholic influence in America may do if left undisturbed and unhindered. Dr. Blandshard does not deny the Catholics of America the right to hold their particular beliefs and opinions and to act in conformity with these; he simply points out the danger of Protestant complacency and indifference in the presence of a religious and moral philosophy that at so many points not only differs fundamentally from the Protestant way of life but also threatens many of those values and institutions that Protestants, through the centuries, have come to regard as vital and essential. Therefore Dr. Blandshard calls upon Protestants and all liberals of whatever faith to assert and exercise their right and freedom to criticise and oppose those whose "faith and morals" tend to demean much that is sacred in the "faith and morals" of the non-Catholic world. There is much grim truth in these sentences from the above-named chapter in the Blandshard book: "Actually the Legion of Decency, in its private censorship of about 450 films a year, is far more concerned with Catholic dogma and Catholic [fol. 10] social philosophy than with decency" (page 199), and he continues, "it (the Legion) begins where the censors of the government and industry leave off. It seeks to rate all films according to a kind of super-code that emphasizes distinctly Catholic taboos."

Has the Catholic church, has the cardinal the right to exercise jurisdiction, either direct or indirect, over the artistic tastes and morals of Catholic Americans? I suppose they have, as long as Catholics will submit to such jurisdiction. But an equally important point is that we Protestants have the same right and the same privilege and the same responsibility to state and maintain our case and to defend our convictions and principles, even when this involves public disagreement and controversy. It is therefore most surprising and disquieting to find that the cardinal's attack upon *The Miracle* has called for so little response from non-Catholic, especially Protestant, quarters.

I believe the great majority of my fellow-Americans will agree with me that *The Miracle* is an example of moving and satisfying film-art. Whether in the company of two other and lesser films in the trilogy *Ways of Love* it appears at its best, is another question. I have asked the members of my church to see *The Miracle* and to judge for themselves whether it is as bad as the cardinal says it is, or as good as I think it is.

I can only add that I have a feeling that while all of us welcome comments on such topics as literature, drama, art, and films even from religious leaders and churchmen in high position, we expect such comments to be both enlightened and enlightening. It is my humble and honest opinion [fol. 11] that the ban hurled against *The Miracle* by His Eminence, Francis Cardinal Spellman, is neither enlightened nor enlightening.

### A Symposium

I seldom attend a movie. But if I could see pictures like *The Miracle*, I might become a movie fan. How any one, much less a devout Roman Catholic, could desire to keep people from seeing this picture, I cannot understand. To me it was a real spiritual experience. It is life in the raw, among the country people who make up three fourths of the world, whose only comfort is religion—religion which is half truth and half superstitions that have been handed down from their ancestors and confirmed by their simple-minded priests.

Most of the churches in Latin America are built on spots where the Virgin or some patron saint appeared to an ignorant Indian, a devout child, or a worshipping peasant, and told the chosen messenger to tell the bishop he was to build a chapel on that spot. I cite this not to condemn such religion. I, for one, would not take away from these suffering souls the only comfort they have unless I was prepared to give them something better.

Because *The Miracle* is a profound psychological study, its interpretation will depend on what the spectator himself brings to this story. The theologian studying religion, the sociologist studying ways of aiding the poor, parents who have gone through the agony of child bearing, or an artist interested in life and beautiful scenery, I should think, [fol. 12] would appreciate *The Miracle*. The ordinary box office patron will probably give three cheers for something different from the Hollywood cliché.

Samuel Guy Inman, President, World Press.

After seeing *The Miracle* I am all the more convinced that the Board of Regents of the State of New York should not revoke the license of this controversial Italian film. The Roman Catholic Church has a perfect right to place a ban on the picture as far as Roman Catholics are concerned, but it certainly has no right to impose its views upon the rest of the citizens. This is still a free country and thought-control is not in order. When private pressure groups begin to dictate what we can see and hear and do, then we are headed for the worst kind of dictatorship.

Stanley I. Stuber, Chairman, Commission on Religious Freedom, Baptist World Congress.

It is hard to conceive of what harm Rossellini's *The Miracle* can do "good" Roman Catholics—unless to think, with the awful possible consequence of honest doubt, is to be done harm. It is irrelevant to consider the possible effects on "bad" Christians of any persuasions. The film is imaginative and strikes the spectator as sincere—an interesting and artistic study in psycho-pathology. Scotto does an exceptional job in Pagnol's "*Jofroi*"—a highly amusing film. The Renoir skit based on de Maupassant is light and

[fol. 13] farcical adult fare. In sum there is a good two hour's entertainment for the discerning.

John F. Davidson, St. George's Church, New York.

There are several things about *The Miracle* which I dislike. Dubbed in English titles are handicap; for this reason I am not fond of foreign language films. And I found the rough and vulgar irreverence toward sacred symbols harshly displeasing, though I do not doubt that in this regard the film presents a true picture of the attitude of many illiterate Italian peasants.

But the entire effect of the play is pitiful rather than sacrilegious. I can see points at which the crudely superstitious type of Roman Catholic might take offense. If for instance he interprets the crazed shepherdess as a caricature of the Virgin, or sees in the facial makeup of the vagabond a subtle likeness to traditional portraits of Jesus. In general it does not seem to me that the story casts ridicule upon any matters of belief which are not rather ridiculous to begin with.

Pity is the dominant mood of my response to this film play. It is a pitiful picture of human brutality on the part of ignorant people who imagine they are religious. It is a pitiful revelation of the dark depths of superstition which pass for religion among the lower classes of Roman Catholic European peasants. It is a pity that the elements of trust in the play have not evoked from Catholic leaders an attitude of repentance rather than an attempt at repression.

F. Howard O'lahan, Church of St. Paul & St. Andrew, New York.

[fol. 14] If Cardinal Spellman's ranting against *The Miracle* did nothing else, it made the venture a profitable one for the theater, and probably the producers of the films. Lines of people waited to be seated, and were amused by both the signs carried by the Roman Catholic pickets, and also the chants which accompanied their march. A novel thing about the picket line was the camaraderie that it had with the police. *The Miracle*, singled out for the cardinal's anathema, has splendid acting, superb camera work and is frightfully grim. Artistically it was not up to the first two of the group of three—*A Day in the Country* and *Jofroi*.

These are both in French, and *The Miracle* in Italian. Tragedy here was so mixed with wonderful gallic humor that they deserve a triple A rating. One could well imagine that the hierarchy might be more disturbed by the sharp satire of a French priest in *Jofroi*, than by what is called "blasphemy" in *The Miracle*. One of the pickets proclaimed, "This degrades American womanhood." Another kept saying, "This is a foreign pitchur, there are good American pitchurs over on Broadway." To make any relevance out of the first was impossible. But taking the two together it might add up to America contra mundi so prevalent today. Esthetically the judgment on these films must be that American producers have much to learn and practice in the art that other countries can show them. Is that what the fight is all about?

Andrew M. Van Dyke, Executive Secretary, Episcopal League for Social Action.

[fol. 15] A telegram, signed by thirty clergymen and laymen, asked the Board of Regents to uphold the decision of its Motion Picture Board to continue the exhibition license granted to *The Miracle*. The telegram said:

"The attempt by private pressure groups to force banning of *The Miracle* is an unwarranted interference in the adequate censorship procedures established by the law of the State of New York. It is our position that while the Roman Catholic Church has every right to forbid any film or other artistic production to its own communicants, it has no legal or moral right to attempt to force its view on state as a whole. As American citizens and Protestants we respectfully urge that you uphold the responsible decision to license *The Miracle* made after careful consideration by your own qualified Motion Picture Board."

The telegram was signed by the following: Clergymen: Thomas Attridge, Richard Aselford, Karl Baehr, John A. Bell, John Bradbury, Emory Stevens Bucke, Karl M. Chwrowsky, Donald B. Cloward, Robert M. Cook, Harold E. Fey, Donald Harrington, John Paul Jones, J. Spencer Kennard, Thomas McCandless, Jack R. McMichael, John Maynard, Wendell Phillips, Charles E. S. Ridgway, Guy Emery Shipper, also J. Smith, Geza Takaro, Carl Hermann Voss,

David Rhys Williams, Joseph H. Titus, Andrew M. Van Dyke. Laymen: Glenn L. Archer, Henry Pratt Fairchild, Freda Kirchwey, Clyde R. Miller, Richard R. Wood.

[fol. 16]

## EXHIBIT 7

Columbia University in the City of New York

[New York 27, N. Y.]

Department of Religion

January 29, 1951.

Board of Regents, New York City.

DEAR SIRS:

I, John Dillenberger, whose official address is Earl Hall, Columbia University, and who am an assistant professor of religion in said institution and a minister of the Evangelical-Reformed Church, declare that I have seen "The Miracle" and do not find it sacrilegious.

"The Miracle" is not an entertainingly pleasant movie; but this has nothing to do with the issue of whether or not it should be shown. Again as a matter of interpretation, the movie can be said to have a positive religious dimension or to express the insane faith of an insane woman. In the first instance, an impossible situation, made plausible by insanity, is redeemed not by a sub-moral but by a transmoral religious dimension. In the second instance, the inner psychological and religious workings of a demented mind are reflected through superb directing and acting. But neither the best nor the worst interpretation justifies the term sacrilegious.

Although the plot of the movie is possible only because of Christianity, it has not been stolen from the Christian context; it is simply a reaction to it without any malicious [fol. 17] intent. No aspersions are cast on any religious body. There will be some who will find it offensive; in my judgment, they are unduly sensitive and read more into the picture than is warranted. That is their right and privilege. But what an individual or group reads in is not legitimately termed sacrilegious, nor does it constitute grounds

for banning it. To do so would put us into the intolerable situation of having every question of freedom determined by the pressure of some religious body. Let those churches to whom it appears sacrilegious tell their constituents to stay away from the movie; this is their right and their freedom. But if they insist that it be banned, they are trespassing upon the freedom of those who honestly believe that it is not sacrilegious and who see nothing offensive in it, either from moral or religious grounds.

Respectfully yours, John Dillenberger.

[fol. 18]

EXHIBIT 8

Columbia University in the City of New York

[New York 27, N. Y.]

Department of Religion

January 29, 1951.

To the Members of the Board of Regents:

I, Frederick T. Schumacher, an ordained minister of the Evangelical and Reformed Church and Instructor in Religion at Columbia University (address: Religion Department, Earl Hall, Columbia University) declare that I have seen "The Miracle" and that I do not consider it sacrilegious.

The movie makes it quite clear that it is dealing with the tragic situation of a demented person and that consequently her religious faith is by no means indicative of that of normal people. No one could assume otherwise, unless they brought to the performance a previously conceived prejudice. In that case the movie is not the cause, but the victim of willful misuse.

I have heard the movie accused of casting aspersions upon the birth of Christ and sections of the Christian dogma related thereto. Nowhere does the movie itself indicate, imply, or suggest that it is attempting to explain or criticise the divine birth on the basis of parallel. Only the hypersensitive or willfully malicious would *read into* the movie

such a meaning. One cannot brand a movie (or any creative work) as sacrilegious only because of possible presuppositions and prejudices *brought to it* by the viewers. I am [fol. 19] thoroughly opposed to outlawing an authentic, sensitive and compassionate movie simply because it might be seen by people who are sacrilegious. An attempt (even by a majority) to ban the movie on this basis is really an attempt to ban the ideas and views which some people might bring to it and thus becomes outright "thought control"—a process which, though present elsewhere in the world, is totally at variance with both American democracy and the Christian faith itself.

Respectfully yours, Frederick T. Schumacher, Instructor in Religion.

#### EXHIBIT 9

West-Park Presbyterian Church

Amsterdam Avenue and 86th Street in the City of New York

Harold C. DeWindt, Minister

The Church House, 165 West 86th Street

January 25, 1951.

Board of Regents, University of the State of New York

MY DEAR SIRS:

I have this day viewed the film "The Miracle" and I wish to say that I found nothing whatever in the picture that was sacrilegious or immoral to the views held by Christian [fol. 20-22] men and women. The acting and the photography were of the very high order. The picture in my judgment contains no offense whatever, and is far superior to scores of pictures which I have seen in the last year or two that have been produced in Hollywood. Many of these pictures, I believe, produced a baleful influence on the moral and spiritual life of the people viewing them.

I should not hesitate for one moment to take my own son

or daughter to see this picture. And I would take them in the assurance that far from being influenced in any evil way by this picture, they would find in it some inspiration and help.

As a Protestant minister here in New York City, and as an officer of the Protestant Council of New York, I respectfully ask that your Board do not ban this picture as a film offensive to the Christian conscience. Certainly if "The Miracle" is banned, it would be a grave travesty on the freedom of the people of the City of New York.

Faithfully yours, Harold C. DeWindt.

HCD:al.

[fol. 23]

#### EXHIBIT 12

The Rev. W. J. Beeners, 100 Stockton Street, Princeton,  
New Jersey

January 26, 1951.

Board of Regents, State of New York.

GENTLEMEN:

I have seen "The Miracle" and found in it no reason for the censorship being urged upon it. The film is unquestionably one of unusual artistic merit, and I myself would have deplored it had I been denied the right to see it merely because of the objection of a minority pressure group.

As regards the strenuous objections now being voiced by the Roman Catholic hierarchy in America, I find it peculiar that "The Miracle" played to Italian audiences for some two years without like interference from the more central source of Roman Catholic authority—Rome itself.

I sincerely believe it would be a great mistake to permit the judgment of a few to determine the movie diet of the whole state. Such arbitrary restriction is more of the essence of totalitarianism than of the democracy which Roman Catholics in America claim to support to such loyal degree. If the Roman Church feels that the film is offensive, let it prohibit the seeing of it among its own people and let the rest of us make our own choices.

Respectfully yours, W. J. Beeners.

[fol. 24]

## EXHIBIT 13

Broadway Tabernacle Church—Congregational

Broadway and Fifty-Sixth Street

211 West 56th Street New York 19, N. Y.

Director of Social Services, Miss Sadie M. Gregory

Ministers: Albert J. Penner, D.D. Joseph D. Huntley, B.D.

January 25, 1931.

Board of Regents, Albany, New York.

GENTLEMEN:

In view of the issues that have been raised relative to the motion picture, "The Miracle," issues both religious and otherwise, I wish to express my own opinion in this matter. I am a Congregational minister and Pastor of the Broadway Tabernacle (Congregational) Church in New York City.

I have seen "The Miracle" and have found it in no sense sacrilegious. I found it in generally good taste. It does not treat the delicate theme either lightly or irreverently. The poor shepherd girl in the story is sinned against and abused and ill-treated, but her own illusions are not a subject of mockery but rather of pity. If the religious issue [fol. 25] were the only issue, I would oppose the picture being banned.

However, the religious issue is not the only issue nor is it the main issue. The main issue, in my opinion, is whether a part of the community—in this case, the Roman Catholic Church—can dictate what the entire community may or may not see. It seems to me that the clear answer to that must be "no." The principle of the freedom of the press is firmly established in our American life. The principle of the present case is precisely the same.

The Roman Catholic Church can, of course, forbid her members to see this film. No one disputes this right. They can and do forbid, with perfect right, their members to read certain books, but they have no right to forbid me to read those books nor to make such books inaccessible to me. Nei-

ther have they the right to forbid me to see this or other films if I care to do so, nor make such films inaccessible.

I, therefore, resent the efforts this church, by political and economic pressure, by threat of boycott and reprisal, has made to seek to place the same restraints upon an entire community that it places upon the Roman Catholic part of it. To me this is a clear violation of fundamental personal rights. I therefore, trust that these rights will, in this instance, be upheld and that this film will not be banned.

Very truly yours, Albert J. Penner.

ajp/eb

[fols. 26-27]

#### EXHIBIT 14

New York, January 16, 1951.

To the New York Board of Regents:

The attempt by private pressure groups to force banning of the film "The Miracle" is an unwarranted interference in the adequate censorship procedures established by the Law of the State of New York.

It is our position that while the Roman Catholic Church has every right to forbid any film or other artistic production to its own communicants it has no legal or moral right to attempt to force its views on the public as a whole.

As American citizens and clergymen, we respectfully urge that you uphold the responsible decision to license "The Miracle", made after careful consideration by your own qualified Motion Picture Board.

J. S. Kennard, Jr., R. John Bloomquist, Murray Drysdale, Earl C. Morgan, Emerson Harbaugh, Emanuel Soni, Marshall L. Scott, Richard A. Riser, G. W. Abington, Andrew M. Van Dyke.

[fol. 28]

## EXHIBIT 16

First Methodist Church  
Corner Beach Street and Janvrin Avenue  
Revere, Massachusetts

Kenneth D. Barringer, Pastor  
67 Lowe Street  
Phone, REvere 8-4844

January 26, 1951.

Mr. Ephraim S. London  
150 Broadway  
New York, N. Y.

DEAR SIR:

Last evening I had the real privilege of witnessing a really great motion picture, "The Miracle." It was the most vivid and realistic picture I had ever seen in my life. Technically, it rates very high in my estimation. Its presentation of a real human tragedy, caught in the web of circumstances, was done with a genuine artistic sensitivity. I would highly recommend it for showing throughout America.

There seems nothing in the picture that appears sacrilegious. My own religious conviction were not offended, and I cannot see where the average Catholic layman would revolt against such a presentation also. I can see where the Catholic hierarchy would find this film objectionable. It portrays a type of religious expression that our Catholic clergy would deem inferior to *our* American Catholic religious life. It also remotely suggests that visions and miracles might have their logical explanation; thus not be directly derived from the divine. Still I do not condemn it. I believe it to be a grave error for any religious minority to try to control thought. They have a perfect right to object to its religious implication, but they do not have the right to prevent others (or even their own) from witnessing a movie that present points with which they find disagreement.

The showing of the film at the Community Church auditorium was in every way commendable. The picture was

excellent and the discussion that followed was rewarding. In the discussion there was a constant répétition of one point especially with which I heartily agree. That question concerned the ultimate question of Civil Rights. Does a minority in our American Democracy ever have the right to suppress, and to bring such pressure against a public body, so as to force that body to deprive the majority of witnessing or having access to a form of art or a story done in motion picture? I believe not. That right is re- [fol. 30-41] served to no one. We are protected from such an abuse to our freedom by our Constitution. If the Board of Regents reverse the lower board and ban this film, they will be establishing a dangerous precedent that might rock the very cradle of our democracy.

Sincerely yours, Kenneth D. Barringer, Minister.

[fol. 42]

EXHIBIT 23

20 Alexander Street  
26 January 1951.

The Board of Regents  
University of the State of New York  
New York, New York

Gentlemen:

I am writing to express to you my great concern over the current campaign of the Roman Catholic Church against the showing of the film, "The Miracle".

I have seen *The Miracle* and have come to the conclusion that the question of sacrilege must be sharply differentiated from the question of censorship.

In my judgment, *The Miracle* cannot be regarded as sacrilegious. It does not confuse human things with divine things. It is not irreverent for it neither parodies nor depreciates the relations between God and man. Most important, however, is the consideration that to declare that *The Miracle* is sacrilegious is to declare that the piety of the Roman Church is itself sacrilegious. This piety is nourished in considerable measure by the veneration of the saints.

Under the conditions of Italian peasant life, it is quite conceivable that the veneration of the saints could impress mentally disordered persons in exactly the way suggested in the film. One cannot, it seems to me, regard the fruitage of Catholic piety as sacrilegious, without regarding the veneration of the saints itself as sacrilegious. Perhaps it is the awareness of some such ambiguity as this which [fols. 43-45] has divided Catholicism itself on this film. It cannot be too much emphasized that a film which was approved in Italy which is, in these matters, and by the Lateran accord, under the control of the Vatican, ought not to be banned on religious grounds in the United States.

I have myself some question whether the theme itself ought to have been filmed. There are many other themes which can be treated, but this question is independent of the issue of sacrilege and of censorship. Censorship in a democratic community can easily lead to the undermining of democracy. This is particularly true when one religious group seeks to impose its views upon the community as a whole. Such claims deeply affect religious liberty as well. For religious liberty is authentic only in so far as it includes the right of dissent. A revocation by the Board of Regents of a license already approved, and under religious group pressure would, in my judgment, gravely injure both religious and democratic liberty.

For these reasons, I most respectfully urge that the Board of Regents sustain its already given approval of the showing of "The Miracle".

Respectfully, Paul Lehmann, Stephen Colwell, Professor of Applied Christianity, Princeton Theological Seminary.

[fol. 46]

## EXHIBIT 26

THE FIRST UNITARIAN CHURCH  
 Ash Avenue and 149th Street  
 Flushing, New York City

Solon D. Morgan, Minister  
 Church Phone: FLashing 3-3860  
 Residence Phone: BAyside 4-0935

February 1, 1951.

Board of Regents, New York City.

Dear SIRS:

As President of the Liberal Ministers' Club of New York, I am pleased to submit herewith a statement signed by a large number of our members. This statement speaks for itself and I am sure it conveys the sentiments of our entire membership.

We respectfully request that the picture "The Miracle" not be banned for showing in the theaters of New York State.

Sincerely yours, Rev. Solon D. Morgan, President,  
 Liberal Ministers' Club of New York.

We, members of the Liberal Ministers' Club of New York, believe that the right of a person to decide for himself [fol. 47] whether or not he wishes to view any particular film, whether it is good or bad, religious or sacrilegious, is guaranteed by the American Constitution and is part of our heritage. We believe that man is a free creature, possessed of freedom of will, and that no pressure group has the right to rob him of the opportunity of making choices for himself in such a matter as viewing a motion picture like "The Miracle".

Even if this picture were considered sacrilegious, and opinions will vary as to this, we would not feel that it should be banned. Since there is a wide divergence of opinion as to what is and is not sacrilegious even in religious groups, for anybody, public or private, religious or non-religious, to seek to deprive the public of its right of judgment in the matter is to seek to violate basic civil and religious liberties.

Rev. Maurice Dawkins

Rev. Phillips E. Osgood  
Rev. Howard L. Brooks  
Rev. J. Spencer Kennard  
Rev. Harry Hooper  
Rev. Homer Lewis Sheffer  
Rev. Raymond M. Scott  
Rabbi Albert S. Goldstein  
Rev. John Haynes Holmes  
Rev. DuBois LeFevre  
Rev. Norman D. Fletcher  
Rev. H. Mortimer Gesner, Jr.  
Rev. John Paul Jones  
Rev. Karl M. C. Chworowsky  
Rev. John H. Lathrop  
Rev. Alfred H. Rapp  
Rev. Charles D. Friou  
Henry Neumann, Leader  
Ethical Soc.  
Rev. Lon Ray Call  
Rev. Ethelred Brown  
Rev. George G. Howard  
Rev. Clifford H. Vessey  
Rev. Albert Allinger  
Rev. James M. Hutchinson  
Rev. Vincent B. Silliman  
Rev. Herbert H. Stroup  
Rev. Pierre Van Paassen  
[fol. 48] Jerome Nathanson,  
Leader Ethical Society  
Albert Herling  
Rev. Charles F. Potter  
Robert Brockway  
Rev. Walter Royal Jones, Jr.  
Rev. Gerald F. Weary  
Rev. Hilary G. Richardson  
Rev. Reginald H. Bass  
Rabbi Julian F. Fleg  
Rev. Donald Harrington  
Rev. Dale DeWitt  
Rev. Solon D. Morgan  
Rev. Maurice Dawkins, Minister of Education, Community Church of New York

- Rev. Phillips E. Osgood, Minister, First Unitarian Church, Orange, N. J.
- Rev. Howard L. Brooks, Asst. Dr., Unitarian Service Committee, New York, N. Y.
- Rev. J. Spencer Kennard, Educator, New York City
- Rev. Harry Hooper, Minister, Unitarian Church of Staten Island, N. Y.
- Rev. Homer Lewis Sheffer, Minister, Unitarian Church of Ridgewood, N. J.
- Rev. Raymond M. Scott, Minister, Universalist Church, Bridgeport, Conn.
- Rabbi Albert S. Goldstein, Bronx, N. Y.
- Rev. John Haynes Holmes, Minister Emeritus, Community Church of New York
- Rev. Dubois LeFevre, Unitarian Minister, New Rochelle, N. Y.
- Rev. Norman D. Fletcher, Minister, Unitarian Church, Montclair, N. J.
- [fol. 49] Rev. H. Mortimer Gesner, Jr., Minister, Unitarian Church, Plainfield, N. J.
- Rev. John Paul Jones, Minister, Union Church, Bay Ridge, Brooklyn, N. Y.
- Rev. Karl M. C. Chworowsky, Minister, Flatbush Unitarian Church, Brooklyn, N. Y.
- Jerome Nathanson, Leader, Ethical Culture Society, New York, N. Y.
- Albert Herling, secular work, New York
- Rev. Charles F. Petter, Minister, First Humanist Society of New York
- Robert Brockway, Northport, L. I. Unitarian Fellowship
- Rev. Walter Royal Jones, Jr., Minister, Church of the Saviour (Unitarian), Brooklyn, N. Y.
- Rev. John H. Lathrop, Minister, Church of the Saviour (Unitarian), Brooklyn, N. Y.
- Rev. Alfred H. Rapp, Minister, First Congregational Church, Flushing, N. Y.
- Rev. Charles D. Friou, Minister, First Congregational Church, Flushing, N. Y.
- Henry Neumann, Leader, Brooklyn Society for Ethical Culture
- Rev. Lon Ray Call, Minister-at-Large, American Unitarian Association

Rev. Ethelred Brown, Minister, Harlem Unitarian Church, New York

[fols. 50-62] Rev. George G. Howard, Minister, Unitarian Church of Hackensack, N. J.

Rev. Clifford H. Vessey, Minister, Community Church, White Plains, N. Y.

Rev. Albert Allinger, Minister, Methodist Church, Cranford, N. J.

Rev. James M. Hutchinson, Minister, Unitarian Church, Trenton, N. J.

Rev. Vincent B. Silliman, Minister, Unitarian Church, Hollis, N. Y.

Rev. Herbert H. Stroup, Minister, Unitarian Church, Rutherford, N. J.

Rev. Pierre Van Paassen, Unitarian Minister, New York, N. Y.

Rev. Hilary G. Richardson, Minister Emeritus, Unitarian Church, Yonkers, N. Y.

Rev. Reginald H. Bass, Minister, Central Community Church, Brooklyn, N. Y.

Rabbi Julian F. Fleg, New York, N. Y.

Rev. Gerald F. Weary, Minister, Unitarian Church, Port Washington, L. I.

Rev. Donald Harrington, Minister, Community Church of New York.

Rev. Dale DeWitt, Regional Director, American Unitarian Association, New York, N. Y.

Rev. Solon D. Morgan, Minister, Unitarian Church, Flushing, N. Y.

[fol. 63]

## EXHIBIT 34

Princeton University  
Princeton New Jersey

Department of Philosophy

January 25, 1951

Dear Mr. London:

I sent the annexed letter today to the New York Times. It is probably too long for quotation by you in full, but you might care to use parts of it.

Yours very truly, W. T. Stace.

wts;f

January 25, 1951

Editor, New York Times, New York, New York.

Dear Sir:

Attempted impartial analysis of the issues regarding the controversial film *The Miracle* seems to me to yield the following results.

(1.) *Is it blasphemous or sacriligious?* No story, considered simply as a narration of facts about the actions of human beings, can be in itself blasphemous or immoral. The blasphemy or immorality, if it exists will always lie in some interpretation suggested by the way in which the story is told. For instance, murder is immoral. But a story relating the facts of a murder is not an immoral story. [fol. 64] It may become so, however, if it is told in such a way as to condone, or incite to murder. *The Miracle* tells the story of a pious but half-witted woman who becomes pregnant by a man whom she believes to be St. Joseph, and who then imagines herself to be the Virgin Mary. Since this is a possible human fact, to relate it cannot be sacriligious in itself. The only possible question concerns the interpretation suggested by the manner of presentation. If the film were intended to cause people to scorn or ridicule the doctrine of the Virgin Birth, or to disbelieve it, it could reasonably be called sacriligious from the point of view of an orthodox Christian. But there is no hint of any such suggestion the film. Its plain interpretation or lesson

is to show with what brutality and inhuman lack of feeling well-meaning, but thoughtless folk may treat a poor demented woman who has religious hallucinations. It excites in the audience sympathy for the unfortunate woman and some indignation against the callousness of her neighbors. This cannot possibly be sacrilegious, and is on the contrary a highly moral lesson.

(2.) *Should it be censored?* - Plainly not, if the above interpretation is correct. But suppose we assume that it is an attempt to cast aspersions on Christian beliefs. Should it then be censored? The argument often used is that a minority, such as the Catholics in America, has no right to suppress what offends it or to enforce its views on the majority. This is the wrong argument. The democratic principle of freedom of expression is rather that even a majority has no right to suppress what offends it and [fols. 65-89] enforce its views on minorities. Otherwise no minority view would ever have any chance of expression. For instance, the Protestant majority in this country ought not to suppress a Catholic film which in some way offended Protestant principles. A lecture urging atheism is admittedly protected by our principle of freedom of speech. The same principle should apply to an anti-religious film, though of course I deny that *The Miracle* is anti-religious. The only proper grounds for censorship are if a public exhibition might be expected to lead to a breach of the peace, or if it has a direct tendency to produce dangerously immoral activities in the audience, as for instance the exhibition of extreme sexual lewdness on the stage might do. *The Miracle* has no tendency of the latter kind, and if Catholics should urge that it might lead to a breach of the peace, they would condemn themselves, since certainly no non-Catholic is going to proceed to violence.

Yours faithfully, W. T. Stace, Professor of Philosophy.

[fol. 90]

## EXHIBIT 53-A

(Herald Tribune, Tuesday, January 30, 1951)

**"The Miracle"****Catholic Layman Protests Ban on Film****To the New York Herald Tribune:**

There is in the current issue of the "Magazine of Art" an editorial contributed by a distinguished Catholic layman, Mr. Otto L. Spaeth, which I should like to call to the attention of your readers. It protests the recent action of New York City's License Commissioner, Edward T. McCaffrey banning from further showing the film "The Miracle." The essential paragraphs of his argument are as follows:

"The Miracle" is either a thing of blasphemy or a thing of beauty. It is either an insult to the church or it is a magnificently moving and profound religious work of art.

At the outbreak of the controversy, I immediately arranged for a private showing of the film. I invited a group of Catholics, competent and respected for their writings on both religious and cultural subjects. The essential approval of the film was unanimous.

There was, indeed, "blasphemy" in the picture—but it was the blasphemy of the villagers, who stopped at nothing, not even the mock singing of a hymn to the Virgin, in their brutal badgering of the tragic woman. The scathing indictment of their evil behavior, implicit in the film, was seemingly overlooked by its critics.

[fols. 91-95] There are great sections of the adult American public entitled and equipped to make the decision that the commissioner attempted to reserve for himself. Neither opinion of the film should color one's view of the commissioner's action. I would oppose it even if I happened to share his views. Of course, I would not favor showing "The Miracle" as a popcorn contremps on a double bill with an Esther Williams submarine spectacle. But the film appeared in an art theater catering to adult audiences. That is its proper place.

The most regrettable side of this controversy is that "The Miracle" now lends itself to the kind of exploitation that attended display of manicured versions of salacious baubles like "The Outlaw." The commissioner's action can only help to insure his original forebodings, which would otherwise never have come to pass.

It should be added that Mr. Spaeth, now director of the American Federation of Arts, is also past president of the Liturgical Arts Society, a Catholic organization, and served as a delegate to the First International Congress of Catholic Artists, held in Rome last September.

I submit these statements by a prominent churchman for the light they may shed upon his church's attitude toward the issues which are coming before the Motion Picture Division of the New York State Board of Regents at Albany next week.

Alfred H. Barr, Jr.

New York, Jan. 27, 1951.

[fols. 96-149]

EXHIBIT 53-E

TRafalgar 4-0012-0013

Bernard J. Bamberger, D. D.

Rabbi

West End Synagogue

Congregation Shaaray Tefila

One Sixty West Eighty Second Street

New York 24, N. Y.

February 1, 1951.

The Board of Regents,  
University of the State of New York,  
Albany, New York.

GENTLEMEN:

Regarding the motion picture, "The Miracle", I wish to endorse vigorously the statement by Mr. Allen Tate published in the New York Times today, February 1.

Some censorship of films is no doubt necessary, but it should be limited to the indispensable minimum. It is justified when it limits matter that endangers public order, safety, or morality. I have seen "The Miracle," and find in it no threat to the general welfare. Whether it is sacrilegious can be decided only in terms of a specific theology. For the state to intervene in determining such a question, on which men of the highest integrity and piety disagree, is not only a violation of constitutional principles, but a serious threat to the independence of all religious agencies.

I hope that your body will not take any action to suppress this film.

Respectfully yours, Bernard J. Bamberger, Rabbi.

BJB/b.

[fol. 150]

#### EXHIBIT 75

(Washington, D. C. Post, Dec. 31, 1950)

#### Licensing Films

New York, in certain respects the most provincial of American cities, has just suffered another attack of official censorship intended to protect its citizens from the corruptive influence of art. The censored subject on this occasion is a motion picture titled "The Miracle," one of a trio of imported films called "Ways of Love" which on Wednesday was voted the best foreign-language program of the year by the New York film critics. "The Miracle" deals with religious passion in a way which City License Commissioner Edward T. McCaffrey considers a "blasphemous affront to a great many of our fellow citizens."

Mr. McCaffrey, having the power to do so, banned the film forthwith. This keeps it from being seen not only by those who might agree with his view of it but also by those who might reasonably consider it an affront to have their choice of motion picture entertainment determined by a license commissioner. It has not been suggested that this film is in any way obscene or detrimental to the morals of the young; indeed, it had previously run the censorship gantlet of the United States Customs, the New York State Board of Censors and the National Board of Review—the

last of which, incidentally, labeled it "approved and highly recommended."

The merits of the picture are, however, beside the point. Many books, plays, films and other works of art are likely to prove offensive to some segments of the public. "The Miracle" may be among them, although it was chosen for [fol. 151] the Venice Film Festival in Italy, a devoutly religious country, and has been seen, according to its American producer, by 25,000 persons in New York without any protest whatever. But in any case no one is obliged to go see it. Enough is now known about its content to warn those whose sensibilities might be distressed by it, and other New Yorkers ought to be free to take it or leave it as they choose. This freedom of choice, which is the essence of a free society, has now been destroyed—we hope only temporarily—by the caprice of a single official.

#### EXHIBIT 76

(Boston-Herald, 1-2-51)

#### Film Censorship

The censorship by a New York license commissioner of the Italian film "The Miracle" was made to look peculiarly ridiculous by the almost simultaneous finding by the New York film critics that it was the best foreign language film of the year. But it took a New York Supreme Court justice to induce the commissioner to revoke the ban.

The New York censor had objected to the film on the ground that it was "officially and personally blasphemous." It portrays an idiot woman who is seduced by a man she believes to be St. Joseph. This is admittedly a delicate theme, but the picture has been viewed by thousands of sensitive and responsible people who found in it no offense. Indeed, as an entry in the Venice Film Festival it was passed upon by an official representative of the Vatican. [fol. 152] The blasphemy charge, therefore, appears to be quite absurd.

In fact, however, neither the demonstrably high artistic quality of the film nor its apparent blamelessness on the

score of religious propriety is completely relevant. If it had been a poor film and a tasteless one, the license commissioner would have been overstepping his authority in banning it. The New York critics rightly stated that the act was "symptomatic of a growing tendency toward dangerous censorship of the content of films."

The United States Supreme Court is expected to hold shortly, although it has not heretofore, that moving pictures are covered by the free speech clause of the First Amendment. They have become an important medium of expression, and as such, in our tradition, they should be protected from the arbitrary censorship of individuals.

It is highly desirable that the movie industry continue to police itself. The medium is powerful and subject to abuse. It is perfectly proper that private groups, representing religious and other interests, should review moving pictures and publish their ratings for the guidance of those who wish it. But official censorship is quite another thing and jeopardizes our intellectual freedom. Let the producer be answerable in court for any violation of law in his presentation, but let no official prejudge the case *in camera*.

Morris Ernst has wisely stated that, "if ideas are unwholesome, the human race must some day become adult enough to appraise, to accept, to reject." No democracy ever grew to maturity on ideological spoon-feeding. The censor has no democratic function.

[fol. 153] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of October in the year of our Lord one thousand nine hundred and fifty-one, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding, Raymond J. Cannon, Clerk.

Remittitur October 19, 1951.

[fol. 154] In the Matter of the Application of JOSEPH  
BURSTYN, INC., Appellant,  
For an Order &c.,

ag'st.

LEWIS A. WILSON, Commissioner of Education of the State  
of New York, & ors., as Regents of the University of the  
State of New York, Respondents

Be It Remembered, That on the 29th day of May in  
the year of our Lord one thousand nine hundred and fifty-  
one, Joseph Burstyn, Inc., the appellant in this cause, came  
here unto the Court of Appeals, by Ephraim S. London, its  
attorney, and filed in the said Court a Notice of Appeal  
and return thereto from the order of the Appellate Division  
of the Supreme Court in, and for the Third Judicial  
Department. And Lewis A. Wilson, Commissioner of Edu-  
cation of the State of New York, & ors., as Regents of  
the University of the State of New York, the respondents  
in said cause, afterwards appeared in said Court of Appeals  
by Charles A. Brind, Jr., their attorney.

Which said Notice of Appeal and the return thereto, filed  
as aforesaid, are hereunto annexed.

[fol. 155] Whereupon, The said Court of Appeals having  
heard this cause argued by Mr. Ephraim S. London, of  
counsel for the appellant, and by Mr. Charles A. Brind,  
Jr., of counsel for the respondents, briefs filed by amici  
curiae, and after due deliberation had thereon, did order  
and adjudge that the order of the Appellate Division of  
the Supreme Court appealed from herein be and the same  
hereby is affirmed, with costs.

And it was also further ordered, that the records afore-  
said, and the proceedings in this Court, be remitted to the  
said Supreme Court, there to be proceeded upon according  
to law.

[fol. 156] Therefore, it is considered that the said order  
be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return  
thereto aforesaid as the judgment of the Court of Appeals  
aforesaid, by it given in the premises, are by the said Court  
of Appeals remitted into the Supreme Court of the State  
of New York before the Justices thereof, according to the

form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, October 19, 1951.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk. (Seal.)

[fol. 157] IN SUPREME COURT OF NEW YORK

[Title omitted]

JUDGMENT OF THE SUPREME COURT ON REMITTITUR—November 23, 1951

The above named petitioner-appellant having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of this court, Third Department, entered in the office of the Clerk of the County of Albany on the 15th day of May, 1951, unanimously confirming the determination of the respondents together with Fifty (\$50.00) Dollars costs and disbursements, the said proceeding having been commenced by the service of an order to show cause dated February 16, 1951, and transferred for a disposition to the Appellate Division of this court, Third Department, and from each and every part of said order of confirmation, as well as from the whole thereof; and the said appeal having been duly argued in the said Court of Appeals, and after due deliberation the Court of [fol. 158] Appeals having ordered and adjudged that the order of the Appellate Division of the Supreme Court appealed from herein be affirmed, with costs, and having fur-

ther ordered that the proceedings therein be remitted to this Court and to be proceeded upon according to law; and the remittitur from the said Court of Appeals having been filed herein,

Now, on motion of Charles A. Brind, Jr., Attorney for respondents herein, it is

Ordered, that the order of the said Court of Appeals be and the same hereby is made the order of this court; and that the order entered in the office of the Clerk of the County of Albany on the 15th day of May, 1951, be, and the same hereby is, affirmed with costs.

Enter

Kenneth S. McCaffer, J. S. C.

[fols. 159-161] Sir:

Please take notice that the foregoing is a true copy of an order duly made in the above entitled matter and duly entered and filed in the office of the Clerk of the County of Albany, on the 23rd day of November, 1951.

Dated, Albany, N. Y., November 28, 1951.

Charles A. Brind, Jr., Attorney for Respondents,  
Office & P. O. Address: State Education Building,  
Albany, N. Y.

To Ephraim S. London, Attorney for Petitioner-Appellant, 150 Broadway, New York City. O'Connor and Farber, Attorneys for Petitioner, 120 Broadway, New York City. Samuel E. Aronowitz, of Counsel, 100 State Street, Albany, New York.

[fol. 162] IN COURT OF APPEALS OF NEW YORK

**OPINION OF COURT OF APPEALS, CONCURRING OPINION, AND  
DISSENTING OPINION**

FROESSEL, J.:

A license for the exhibition of a motion picture film entitled "The Miracle" together with two other films, described in their combination as a trilogy and called "Ways of Love," was issued to petitioner on November 30, 1950, by the motion picture division of the Department of Educa-

tion of the State of New York, under the governing statute (Education Law, art. 3, part II). "The Miracle" was produced in Italy as "Il Miracolo," and English subtitles were later added. A prior license had been issued to the original owner of the distribution rights for exhibition, with Italian subtitles alone, but the film was never shown under that license.

The first public exhibition of "The Miracle" as part of the trilogy, "Ways of Love," was shown in New York City on December 12, 1950. It provoked an immediate and substantial public controversy, and the Education Department was fairly flooded with protest against its exhibition. Others expressed a contrary view. In consequence thereof, the Board of Regents of the University of the State of New York (hereinafter called the Regents) proceeded promptly to review the action of its motion picture division. It appointed a subcommittee, and directed a hearing requiring petitioner to show cause why the licenses should not be rescinded and cancelled.

[fol. 163] After viewing the film and giving petitioner an opportunity to be heard, its subcommittee reported that there was basis for the claim that the picture is sacrilegious, and recommended that the regents view the film. Petitioner declined to participate in the hearing other than to appear specially before the subcommittee for the purpose of challenging the jurisdiction of the Regents to cancel the licenses, but its sole stockholder, Joseph Burstyn, appeared as an individual and filed a brief.

Thereupon and on February 16, 1951, after reviewing the picture and the entire record, the Regents unanimously adopted a resolution rescinding and canceling the licenses upon their determination that "The Miracle" is sacrilegious, and not entitled to a license under the law. Thereafter petitioner instituted the present Article 78 proceeding to review that determination, and now urges that (1) the Regents were powerless to review the action of its motion picture division or to revoke the licenses; (2) the word "sacrilegious" does not provide a sufficiently definite standard for action; (3) the Regents exceeded their authority; (4) the statute is unconstitutional as in violation of the First and Fourteenth Amendments of the Constitu-

tion of the United States in that denial or revocation of a license on account of sacrilege interferes with religious liberty and breaches the wall between church and state; and (5) the statute is unconstitutional *in toto* as a prior restraint on the right of free speech guaranteed by the First and Fourteenth Amendments of the Federal Constitution. The Appellate Division ~~unanimously~~ confirmed the determination of the Regents.

First: The principal argument advanced by petitioner is directed toward the claim that the Regents have no power under the statute to rescind a license once issued by the motion picture division, unless upon a charge of fraud in the procurement thereof or subsequent misconduct by the [fol. 164] licensee. Any other construction of the statute, it is said, would be inequitable to petitioner, which has spent money relying upon the license as issued. The Regents, on the other hand, contend that they were empowered under the Education Law and our State Constitution to make the determination here challenged.

This issue, then, is one primarily of statutory construction, turning upon the intention of the Legislature as found in the language of the statutes. It is resolved by the answer to the question: Did the Legislature intend that the granting of a license by a subordinate official of the State Education Department should be a determination final and irrevocable, binding on the head of his department, the courts and the public for all time? As we said in *Matter of Equitable Trust Co. v. Hamilton* (226 N. Y. 241, 245) "That is in every case a question dependent for its answer upon the scheme of the statute by which power is conferred."

In considering the statute pattern conferring the power, we should note the framework of fact and circumstance in which the statutes are to be examined, and particularly the nature of the problem with which we are dealing. Motion pictures, by their very nature, present a unique problem. They are primarily entertainment, rather than the expression of ideas, and are engaged in for profit (*Mutual Film Corp. v. Industrial Commission of Ohio*, two cases, 236 U. S. 230, 247; *Mutual Film Corp. v. Hodges*, 236 U. S. 248). They have universal appeal to literate and illiterate, young and old, of all classes. They may exercise influence for

good, but their potentiality for evil, especially among the young, is boundless. As was said in *Pathe Exchange, Inc. v. Cobb* (202 App. Div. 450, 457, affd. 235 N. Y. 539), where we sustained the original statute (L. 1921, ch. 715) creating the "motion picture commission," in respect to current events films: " \* \* \* many would cast discretion and self-control to the winds, without restraint, social or moral. There are those who would give unrestrained rein to passion. \* \* \* They appreciate the business advantage of depicting the evil and voluptuous thing with the poisonous charm." A public showing of an obscene, indecent, immoral or sacrilegious film may do incalculable harm, and the State, in-making provision against the threat of such harm (Education Law, sec. 122), may afford protection as broad as the danger presented.

We are thus concerned with a valid exercise of the police power (*Mutual Film* cases, *supra*; annotation 64 A. L. R. 505, and cases therein cited; *Pathe Exchange, Inc., v. Cobb, supra*), and with rights acquired by licensees thereunder. Such rights are not contractual in the constitutional sense (*People ex rel. Lodes v. Dept. of Health, etc.*, 189 N. Y. 187; 12 Am. Jur., Constitutional Law, sec. 405; 33 Am. Jur., Licenses, secs. 21, 65). This is the general rule notwithstanding the expenditure of money by a licensee in reliance upon the license, although there is authority to the contrary in the case of building permits (33 Am. Jur., Licenses, sec. 21; *People ex rel. Lodes v. Department of Health, etc., supra*, distinguishing at p. 196, *City of Buffalo v. Chadeayne*, 134 N. Y. 163). Moreover, rights gained under the statute are accepted with whatever conditions or reservations the statute may attach to them. With these precepts in mind, and in the light of the problem with which the Legislature dealt, we may properly turn to a consideration of the statutory scheme.

The original body for the licensing of motion pictures for exhibition in this State was an independent commission created by chapter 715 of the Laws of 1921, its members appointed by the Governor, by and with the advice and consent of the Senate. While the provisions for licensing were similar to those now in the Education Law, there was an essential difference in the scheme embodied therein

due to the *independent* nature of the former commission, which was then expressly given all of the powers now granted to the Regents. In 1926, the functions of the motion picture commission were transferred to the Department of Education and the old commission was abolished [Vol. 166] (L. 1926, ch. 544; State Departments Law, sec. 312). In 1927, the present form of the statute was incorporated into the Education Law as article 43 thereof (L. 1927, ch. 153, secs. 28, 29). These changes were significant, as will presently more fully appear.

The Regents are a constitutional body, existing since 1784 (N. Y. Const., art. XI, sec. 2). They are named as head of the education department in the same paragraph as are the three chief elective officers of the State, the Governor, Comptroller and Attorney-General (art. V, sec. 4). The latter provision of our Constitution empowers the Regents to "appoint and at their pleasure remove a commissioner of education to be the chief administrative officer of the department." The mere placing of the motion picture commission in the department of education indicates an intention that the Regents should henceforth exercise complete authority over that agency.

Moreover, by explicit language, the Legislature gave to the Regents as head of the education department all of the broad powers of control and supervision formerly possessed by the independent commission, leaving to the motion picture division only "the administrative work" of licensing (Education Law, secs. 101, 103, 132). Thus, by section 101, of the Education Law, the education department "is charged" with "the exercise of all the functions" of the department, and with "the performance of all" the "powers and duties" transferred from the former independent motion picture division, "whether in terms vested in such department" or in any "*division*" thereof. (Emphasis supplied.) And such performance is authorized "by or through" the appropriate officer or division; by the same section the Regents are continued as "the head of the department," as prescribed in the Constitution. The Regents appoint the director, officers and employees of the motion picture division, fix their compensation, assign duties to the division, establish local offices, and "prescribe the powers

[fol. 167] and duties" (Education Law, secs. 120, 121). The "form, manner and substance" of license applications are prescribed by the education department, and not by the motion picture division (Education Law, sec. 127).

The Regents must review the denial of a license before an unsuccessful applicant, who is given a "right of review by the regents," can avail himself of an article 78 proceeding (Education Law, sec. 124). A corresponding right of review where a license was issued must be deemed implicit in the broad powers of the board, rendering needless any additional language by way of express grant; when the Legislature intends to withhold the power of review from the head of a department with respect to the finding of an agency of the department, it does so by express language (Labor Law, Labor Relations, sec. 702, subd. 9; Workmen's Compensation Law, sec. 142, subd. 4). Finally, the Regents "have authority to enforce the provisions and purposes" of the statute and to make rules and regulations in "carrying out the enforcing (its) purposes" (Education Law, sec. 132; emphasis supplied). This latter provision is taken directly from the original statute (sec. 15), and, although not embraced in the 1926-enactment transferring functions of the independent motion picture commission, this precise authority was expressly given to the Regents by the 1927 amendment (former sec. 1092 of the Education Law). The power to enforce embraces the power to correct the action of a subordinate, and one of the specific provisions and purposes of the act is that no sacrilegious films be licensed.

From all of this it is clear that the motion picture division is subject and subordinate to the education department and the Regents, and is not independent thereof (*cf. Butterworth v. United States*, 112 U. S. 50, in which an altogether different statute pattern was involved, and where an appeal was expressly authorized from the commissioner [fol. 168] to the court, either directly or by means of an original suit in equity). Even such functions as may now be exercised by the director of the division under the statute may be exercised by other officials upon authorization by the Regents (Education Laws, secs. 120, 122). Without question, then, the statute constitutes the Regents the main spring of the entire system therein set up. To deny them

the power to correct the action of a subordinate, when the ultimate responsibility rests upon them, would be to set at naught the whole elaborate plan established by the Legislature. Such power is "essential to the exercise" of the powers expressly granted (*Lawrence Constr. Corp. v. State of New York*, 293 N. Y. 634, 639).

If petitioner's interpretation of the Education Law were to be adopted, no review either of an administrative or supervisory nature, or through the civil or criminal courts (see Penal Law; sec. 1141, as amended by L. 1950, ch. 624; *Hughes Tool Co. v. Fielding*, 188 Misc. 942, affd. 272 App. Div. 1048, affd. 297 N. Y. 1024), of the action of a subordinate granting a license in the first instance as provided by the Legislature. Thus, the most indecent, obscene, immoral, sacrilegious or depraved presentation might be made through the medium of motion picture film, provided only there was some slip, inadvertence or mistake on the part of the reviewer, leaving his superiors, the courts, and the public generally powerless to correct the situation. It would simply mean that this statutory plan to protect the public from films forbidden to be licensed for general exhibition under section 122 rests entirely upon the judgment of one or two persons in the motion picture division, whose favorable determination in the first instance is irrevocably binding on the People of the State of New York. Such intention on the part of the Legislature would seem to be so utterly unreasonable and out of harmony with basic public policy in these matters as to be unthinkable (*People v. Ahearn*, 196 N. Y. 221, 227).

[fol. 169] On the other hand, the only reasonable view to be taken is that the Legislature deemed the Constitution and the Education Law vested in the Regents as an independent constitutional body such supervisory powers as sufficiently to protect the public interest against improper action by subordinates, and that the authority thereby granted is therefore sufficiently complete in itself to accomplish the salutary purposes envisioned therein. Once the Legislature placed the power to license in the department of education, the Constitution (art. V, sec. 4) mandated the Board of Regents as its head to exercise it, and there is no legislation even purporting to restrict them

from doing so. They are authorized to employ subordinates and to function "by or through them," but are not thereby divested of their own ultimate responsibility. The action of the motion picture division must thus be regarded as reviewable by the Regents in any case—where the license is refused, on demand of the applicant; where the license is granted, on the Regents' own motion.

Accordingly, we are of the opinion that the Regents have power to review the action of its motion picture division in granting a license to exhibit motion pictures, and rightfully exercised its jurisdiction in this case.

*Second:* To the claim that the statute delegates legislative power without adequate standards, a short answer may be made. Section 122 of the Education Law provides that a license shall be issued for the exhibition of a submitted film, "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." Only the word "sacrilegious" is attacked for indefiniteness. The dictionary, however, furnishes a clear definition thereof, were it necessary to seek one, as, e. g., "the act of violating or profaning anything sacred" (Funk & Wagnall's New Standard Dictionary, 1937). There is no difficulty in recognizing the limits of the [fol. 170] criterion thus established, and the courts have had no problem either with the word "sacrilegious" or with its synonym, "profane."

In *Mutual Film Corp. v Hedges* (236 U. S. 248, *supra*), the contention that there was an invalid delegation of legislative power was rejected where the statute provided that the censor should approve such films as were found to be "moral and proper, and disapprove such as are *sacrilegious*, obscene, indecent, or immoral, or such as tend to corrupt the morals" (emphasis supplied). In *Winters v. New York* (333 U. S. 507, 510) it is stated that publications are "subject to control if they are lewd, indecent, obscene or profane" (emphasis supplied). In *Chaplinsky v. New Hampshire* (315 U. S. 568, 571-572) Mr. Justice Murphy declared for a unanimous court: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to

raise any Constitutional problem. These include the lewd and obscene, the *profane* . . . (emphasis supplied). Indeed, Congress itself has found in the word "profane", a useful standard for both administrative and criminal sanctions against those uttering profane language or meaning by means of radio (*Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153, 156, certiorari denied 340 U. S. 929; U. S. Code, tit. 47, Annotated, sec. 303, m, D; U. S. Code, tit. 18, Annotated, sec. 1464; see, also, Penal Law, sec. 2072).

Accordingly, the claim that the word "sacrilegious" does not provide a sufficiently definite standard may be passed without further consideration, since it is without substance.

*Third:* We turn now to the contention that the Regents exceeded their powers.

Petitioner urges that, even if the board had the power, there was no justification for revocation. Of course, as the Appellate Division below, in its opinion, said: "Under the familiar rule, applicable to all administrative proceedings, we may not interfere unless the determination made was one that no reasonable mind could reach." This rule applies to the courts and not to administrative agencies, as the Regents. (*Matter of Foy Productions, Ltd. v. Graves*, 253 App. Div. 475, affd. 278 N. Y. 498.)

We have all viewed the film in question. The so-called exhibits, which are simply unsworn communications expressing personal opinions, are of little help to us. The principal basis for the charge of sacrilege is found in the picture itself, the personalities involved, the use of scriptural passages as a background for the portrayal of the characters, and their actions, together with other portions of the script and the title of the film itself. It is featured as a "way of love." At the very outset, we are given this definition: "ardent affection, passionate attachment, men's adoration of God, sexual passion, gratification, devotion."

While the film in question is called "The Miracle," no miracle is shown; on the contrary, we have the picture of a demented peasant girl meeting a complete stranger whom she addresses as "Saint Joseph". At the very beginning of the script, reference is made to "Jesus, Joseph, Mary". "Saint Joseph" first causes her to become intoxicated. Scriptural passages referring to the Holy Sacrament (Luke

22:19), and to the nativity of Christ (Matt. 1:20), are freely employed immediately after she states she is not well. A blackout in the film, in its association with the story, compels the inference that sexual intercourse and conception ensue. "Saint Joseph" abandons her immediately following the seduction, she is later found pregnant, and a mock religious procession is staged in her honor; she is "crowned" with an old washbasin, is thrown out by her former lover, and the picture concludes with a realistic portrayal of her labor pains and the birth in a church courtyard of her child, whom she addresses as "my blessed son", "My holy son".

[fol. 172] Christ is the heart and core of the Christian faith. Two personalities most closely related to Him in life were His mother, Mary, and Joseph. They are deeply revered by all Christians. Countless millions, over the centuries have regarded their relationship as sacred; and so do millions living today. "The Miracle" not only encroaches upon this sacred relationship and the Biblical presentation thereof in respect to the birth of Christ, but utterly destroys it, associating it, as the Regents found, "with drunkenness, seduction, mockery and lewdness", and, in the language of the script itself, "with passionate attachment, sexual passion and gratification", as a way of love.

In the light of the foregoing, we conclude, as did the Appellate Division, that we cannot say that the determination complained of "was one that no reasonable mind could reach"; and that the board did not act arbitrarily or capriciously.

*Fourth:* It is further urged that a license may not be denied or revoked on the ground of sacrilege, because that would require a religious judgment on the part of the censoring authority and thus constitute an interference in religious matters by the State. In this connection, it is also urged that freedom of religion is thereby denied, since one man's sacrilege is another man's dogma, and one may thus be prevented from propagating his own religious views by means of motion pictures. The latter argument is specious when applied to motion pictures offered to the public for general exhibition as a form of entertainment, as we shall hereafter point out. Religious presentations, as ordinarily

understood, as well as other educational and scientific films, are exempt (Education Law, sec. 123). Thus freedom of religion is not impaired in the slightest, as anyone may express any religious or anti-religious sentiment he chooses through a proper use of the films.

Nor is it true that the Regents must form religious [fol. 173] judgments in order to find that a film is sacrilegious. As hereinbefore indicated, there is nothing mysterious about the standard to be applied. It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule to the extent that it has been here, by those engaged in selling entertainment by way of motion pictures. As the court below said of the statute in question, "All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom."

Although it is claimed that the law benefits all religions and thus breaches the wall of separation between church and state, the fact that some benefit may incidentally accrue to religion is immaterial from the constitutional point of view if the statute has for its purpose a legitimate objective within the scope of the police power of the State (*Everson v. Board of Education*, 330 U. S. 1; *Cochran v. Louisiana State Board*, 281 U. S. 370; *Bradfield v. Roberts*, 175 U. S. 291; *People v. Friedman*, 302 N. Y. 75, appeal dismissed for want of substantial Federal question 341 U. S. 907). Cases such as *People ex rel. McCollum* (333 U. S. 203) and *Cantwell v. Connecticut* (310 U. S. 296) are not to the contrary. The former case dealt with the use of state property for religious purposes (*Zorach v. Clauson*, 302 N. Y. —), while the latter held (p. 305) that "a censorship of religion as the means of determining its right to survival is a denial of liberty protected by the" First and Fourteenth Amendments. Yet even in those cases it was recognized that the States may validly regulate the manner of expressing religious views if the regulation bears reasonable relation to the public welfare. Freedom to believe—or not to believe—is absolute; freedom to act is not. "Conduct remains subject to regulation for the protection of society" (*Cantwell*

v. Connecticut, *supra*, at p. 304; *American Communications* [fol. 174] *Assn. v. Douds*, 339 U. S. 382, 393).

The statute now before us is clearly directed to the promotion of the public welfare, morals, public peace and order. These are the traditionally recognized objects of the exercise of police power. For this reason, any incidental benefit conferred upon religion is not sufficient to render this statute unconstitutional. There is here no regulation of religion, nor restriction thereof or other interference with religious beliefs except insofar as the picture itself does so, nor is there any establishment of religion or preference of religion or use of state property or funds in aid of religion. There is nothing more than a denial of the claimed right to hurl insults at the deepest and sincerest religious beliefs of others through the medium of a commercial entertainment spectacle.

We are essentially a religious nation (*Church of the Holy Trinity v. United States*, 143 U. S. 457, 465), of which it is well to be reminded now and then, and in the *McCollum* case (*supra*) the Supreme Court paused to note that a manifestation of governmental hostility to religion or religious teachings "would be at war with our national tradition" (at p. 211). The preamble to our State Constitution expresses our gratitude as a people to Almighty God for our freedom. To say that government may not intervene to protect religious beliefs from purely private or commercial attacks or persecution, whatever the underlying motive, and however skillfully accomplished, as distinguished from the assertion of conflicting beliefs, is to deny not only its power to keep the peace, but also the very right to "the free exercise" of religion, guaranteed by the First Amendment. The offering of public gratuitous insult to recognize religious beliefs by means of commercial motion pictures is not only offensive to decency and morals, but constitutes in itself an infringement of the freedom of others to worship and believe as they choose. Insult, mockery, contempt and [fol. 175] ridicule can be a deadly form of persecution—often far more so than more direct forms of action. The prohibition of such conduct comes within the legitimate sphere of State action, and this State has recognized this

principle, not only in the Education Law but in other respects as well (see, e. g., Penal Law, art. 186; Civil Rights Law, art. 4). We are not aware that this power has ever been even implicitly denied to the States.

This nation is a land of religious freedom; it would be strange indeed if our Constitution, intended to protect that freedom, were construed as an instrument to uphold those who publicly and sacrilegiously ridicule and lampoon the most sacred beliefs of any religious denomination to provide amusement and for commercial gain.

For the foregoing reasons, we conclude that the challenged portion of the statute in no way violates the provisions of the First Amendment relating to religious freedom.

*Fifth:* Petitioner finally argues that the statute is unconstitutional *in toto*; that motion pictures are to be treated as the press generally, and may not be subjected to censorship or prior restraint. While it may not be heard in this respect, inasmuch as it has sought and obtained benefits under the statute, and even now seeks to retain the licenses granted (*Faherty v. Mallonee*, 332 U. S. 245, 255; *Shepherd v. Mount Vernon Trust Co.*, 269 N. Y. 234, 244-247), we shall dispose of this argument upon the merits.

The contention urged is made in the face of direct holdings to the contrary (*Mutual Film* cases, *supra*; *RD-DR Corp. v. Smith*, 183 F. 2d 562, cert. den. 340 U. S. 853; *Pathé Exchange, Inc. v. Cobb*, 202 App. Div. 450, affd. 236 N. Y. 539; 64 A. L. R. 505).

The rationale of these decisions is that motion pictures [fol. 176] are primarily a form of entertainment, a spectacle or show, and not such vehicles of thought as to bring them within the press of the country. On this basis, petitioner's contention that the *Mutual* cases lack authority today, because it was not the Federal Constitution against which the statute was there tested, is unsound, for the Ohio Constitution guarantees free speech and a free press as does the Federal Constitution. Essentially, what petitioner would have us do is to predict that the Supreme Court will overrule the *Mutual* cases and so disregard them here, as well as our own holding in the *Pathé* case. But such was the position squarely taken in the *RD-DR* case, where the same arguments were presented as are here urged, and they were unequivocally rejected.

On the same footing is the contention that technical developments have made a difference in the essential nature of motion pictures since the *Mutual* decisions. Such development was foreseen in the *Mutual* cases (see p. 242), and was realized at the time of the *RD-DR* case (p. 565), decided a year ago. We have already pointed out that scientific and educational films, among others of kindred nature, are not within the general licensing statute, and are thus not concerned with any problem that might be raised by an attempt to impose general censorship upon such films.

Some comfort is found by petitioner in a statement in *United States v. Paramount Pictures, Inc.* (334 U. S. 131, 166) to the effect that "moving pictures, like newspapers and radio, are included in the press". That was an anti-trust case, freedom of the press was not involved, and the statement was pure dictum. Moreover, it may be observed that when certiorari was sought in the *RD-DR* case, it was denied by the same court; the only Justice voting to grant was the one who wrote that dictum. Were we to rely upon dictum, the concurring remarks of Mr. Justice Frankfurter in a subsequently decided free speech case (*Kovacs v. [fol. 177] Cooper*, 336 U. S. 77, at p. 96), would be appropriate: "Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated." (Citing the *Mutual* cases.) However, dictum is a fragile bark in which to sail the constitutional seas.

The fact is that motion pictures do create problems not presented by other media of communication, visual or otherwise, as already indicated. It should be emphasized, however, that technical developments which increase the force of impact of motion pictures simply render the problem more acute. It does not avail to argue that there is now greater ability of transmission, when it is precisely that ability which multiplies the dangers already inherent in the particular form of expression.

Whether motion pictures are *sui generis* or a very special classification of the press becomes a question for the academicians, once it is recognized that there is a danger presented and met by legislation appropriate to protect the public safety, yet narrow enough as not otherwise to limit

freedom of expression. If there is any one proposition for which the free speech cases may be cited from *Schenck v. United States* (249 U. S. 47) to *Dennis v. United States*, and *Breard v. Alexandria*, decided June 4, 1951, it is that freedom of speech is not absolute; but may be limited when the appropriate occasion arises. We are satisfied that the dangers present and foreseen at the time of the *Mutual Film* cases are just as real today.

The order of the Appellate Division should be affirmed, with costs.

[fol. 178] DESMOND, J. (concurring). I concur for affirmance for these reasons: 1. It is not too clear from the statutes, that the Legislature, transferring (by L. 1926, ch. 544) motion picture licensing from an independent State Motion Picture Commission to a new motion picture division in the State Department of Education intended, without so saying, that the Board of Regents, as head of the education department, should have power to revoke a license granted by the division. However, there is general language in the statute (Education Law, §132) empowering the Regents to enforce the licensing law, including its prohibition against the licensing of "obscene, indecent, immoral, inhuman, sacrilegious" films (Education Law, § 122), and it would be an improbable legislative intent that would leave all this solely to a division of the department, with no corrective authority available elsewhere in the State government. It would be anomalous if the Regents, charged by the statute with enforcing the law, could not correct the errors of their subordinate body.

2. As to whether this film can be considered sacrilegious, our own jurisdiction is limited by the *Miller v. Kling* (291 N.Y. 65) rule which requires us to uphold the administrative body's decision if supported by substantial evidence. In other words, if reasonable men could regard the picture as sacrilegious, then we cannot say that the Regents' ruling is wrong as matter of law. Reasonable, earnest and religious men in great numbers have said so, although other earnest religious voices express the other view. There was thus fair basis for the Regents' holding.

[fol. 179] 3. "Sacrilegious", like "obscene" (see *Winters v. New York*, 333 U. S. 507), is sufficiently definite in mean-

ing to set an enforceable standard. That men differ as to what is "sacrilegious" is beside the point—there is nothing in the world which all men everywhere agree in "obscene", yet obscenity laws are universally enforced. Of course, some of the meanings of "sacrilegious" have no possible application to a motion picture, but, according to all the dictionaries and common English usage, the adjective has one applicable meaning, since it includes violating or profaning anything held sacred (see 8 Oxford Dictionary, pp. 18-19; Webster's New Int. Dictionary [2d ed.], unabridged, p. 2195; Black's Law Dictionary, [de luxe ed.], p. 1574). We thus have a statutory term of broad but ascertainable meaning, and, by settled law, the administrative application thereof must be accepted by the courts "if it has 'warrant in the record' and a reasonable basis in law." (*Matter of Mounting & Finishing Co. v. McGoldrick*, 294 N. Y. 104, 108; *Red Hook Cold Storage Co. v. Dept. of Labor*, 295 N.Y. 1; 9).

4. Motion pictures are, it would seem, not excluded from First Amendment coverage (*United States v. Paramount Pictures*, 334 U.S. 131, 166) but, since there was a reasonable ground for holding this film "sacrilegious" (in the meaning which the Legislature must have intended for that term), the film was constitutionally "subject to control" (*Ex parte Jackson*, 96 U.S. 727, 736 cited in *Winter v. New York, supra*). It fell within the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" (*Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 572—italics mine). The *Chaplinsky* decision says that these narrowly limited classes of constitutionally preventable [fol. 180] utterances include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." That covers this case, and should dispose of any claim of violation of the First Amendment. If not, then any prior censorship at all of any motion picture is unconstitutional, and the floodgates are open.

FULD, J. (dissenting). It may lend perspective to recall that we are here concerned with a motion picture that has

passed the rigid scrutiny of a numerous array of critics of undenied religiousness. There is, of course, no suggestion that "The Miracle" is a product of heathen lands. The story was written by a Roman Catholic and the picture-produced, directed and acted solely by Roman Catholics. It was filmed in Italy, and first exhibited in Rome, where religious censorship exists. There, the Vatican newspaper, *L'Observatore Romano*, weighed its artistry without registering the slightest doubt as to its piety. Then it passed the United States Customs with no voice raised against it.

In 1949 and again in 1950, successive directors of the motion picture division of the State Education Department licensed the film for statewide exhibition. It won the approval of the National Board of Review of Motion Pictures. It drew general acclaim from the press and was designated, as part of a trilogy, the best foreign language film of 1950 by the New York Film Critics, an association of critics of the major metropolitan newspapers. Finally, one important Roman Catholic publication, after deplored, "[fol. 181] highly arbitrary invocations of a police censorship," noted that the film "is not obviously blasphemous or obscene, either in its intention or execution" (*The Commonwealth*, March 16, 1951, pp. 567-568; also, March 2, 1951, pp. 507-508), and all Protestant clergymen who expressed themselves publicly—and they constituted a large number representing various sects—found nothing in the film either irreverent or irreligious.

However, as Judge FROESSEL reminds us, the contrary opinion also found strong voice, eventually reaching the ears of the board of regents. After viewing the film, that body revoked and rescinded the license—some two years after it had been granted—invoking as authority therefor section 122 of the Education Law. That statute provides that the motion picture division shall license each moving picture submitted to it unless it is "obscene, indecent, immoral, inhuman or sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." The board of regents decided that the film is "sacrilegious," and its decision was confirmed by the Appellate Division.

Laying to one side for the moment the question as to the

constitutionality of a statute which sanctions the banning of a moving picture on the ground that it is "sacrilegious", I am of opinion that the regents' action was without legislative warrant.

The controlling statute, the Education Law, is significant both for what it says and for what it leaves unsaid. In section 124, entitled "Review by Regents," the legislature expressly gave the regents power to review a determination of the motion picture division *denying* a license—but it conferred no similar power to review the division's *granting* [fol. 182] of a license. By settled rules of construction, that deliberate omission by the legislature clearly indicates that no such authority was intended (see e.g. Sutherland, *Statutes and Statutory Construction* [3d ed. 1943] §§4915-4917). And the more one searches the statute, the more clearly does that appear. For example, the statute expressly authorizes the regents to revoke a permit issued for the exhibition of a scientific or educational film (§125) and to revoke a motion picture license if it was obtained on a false application or if the licensee tampered with the film or if there is a "conviction for a crime committed by the [film's] exhibition or unlawful possession" (§128). But nowhere in the statute is there to be found any general grant of power to the regents to revoke a previously issued license. This omission is also to be contrasted with the further and explicit grant of such a power or revocation by the same Education Law as regards many other types of licenses issued by the Education Department (See, e.g., §6514 [as to doctors]; §6613 [as to dentists]; § 6712 [as to veterinarians]; §6804 [as to pharmacists] §7108 [as to optometrists]; §7210 [as to engineers]; §7308 [as to architects]; §7406 [as to certified public accountants]; §7503 [as to shorthand reporters].) Clearly, the legislature knew how to bestow the power of revocation when that was its purpose.

Even more recent evidence of the legislature's design is at hand. In 1950, the legislature amended the Penal Law to prohibit prosecution, on the ground of obscenity, of a film licensed under the Education Law (Laws 1950, ch. 624, amending Penal Law, §1141). That enactment was inspired by *Hughes Tool Co. v. Fielding* (297 N.Y. 1024, affg. 272 App.

Div. 1048, affg. 188 Misc. 947). It had there been held that such a criminal prosecution was permissible because the [fol. 183] Education Law neither provided for nor allowed any direct review by the regents or the courts of a decision of the motion picture division issuing a license. If the legislature had disagreed with that interpretation of the Education Law—clearly indicated at Special Term (188 Misc., at p. 952)—it would undoubtedly have amended the Education Law, not the Penal Law. By depriving the state of the power to prosecute the exhibition of a film once it receives a license, the legislature affirmed, as clearly as it could, that the granting of a license is an act of such implacable finality that it may not be challenged collaterally in a criminal prosecution any more than directly in a civil proceeding.

The legislative scheme so clearly expressed, the board of regents may neither rely upon its status as head of the Education Department to reverse decisions of a subordinate which are not the result of illegality, fraud or vital irregularity (see, e.g., *Butterworth v. Hoe*, 112 U.S. 50, 56, 64; cf. *People ex rel. Finnegan v. McBride*, 226 N.Y. 252, 257; *People ex rel. Chase v. Wemple*, 144 N.Y. 478, 482; *Matter of D. and D. Realty Corp. v. Cosfer*, 277 App. Div. 668) nor draw from section 132 of the Education Law—which in overall manner gives the board “authority to enforce the provisions and purposes of part two of this article”—an assumption of authority to “review” and revoke the grant of a license by the motion picture division. All that section [fol. 184] 132 was designed to do, and all that it does, is to authorize enforcement. To construe its general language as authorizing review of the granting of a license is to stretch language beyond all permissible limits and to render superfluous and meaningless the very explicit language of section 124 permitting such review only where a license has been denied.

---

<sup>1</sup> There is no substance to the regents' claim that they were merely correcting the “illegal” action of the motion picture division in licensing a “saerilegious” picture. Since obviously there was at least reasonable doubt as to whether the film was “saerilegious”, the decision of the motion picture division could not be condemned as “illegal.”

"A statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration. A power not expressly granted by statute is implied only where it is 'so essential to the exercise of some power expressly conferred as plainly to appear to have been within the intention of the legislature. The implied power must be necessary, not merely convenient, and the intention of the legislature must be free from doubt.' (*People ex rel. City of Olean v. W.N.Y. & P.T. Co.*, 214 N.Y. 526, 529). *Lawrence Constr. Corp. v. State of New York*, 293 N.Y. 634, 639).

So, here, the regents' contention that they *must* have power to review and revoke in order to guard against error by the motion picture division in granting licenses, is not persuasive. The fact is that, in the twenty-five years during which the motion picture division has been in the Department of Education, the regents have never before reviewed the grant of a license or even suggested the existence of such a power. Limited as we are to a determination of what the legislature has done, the argument of alleged necessity has no weight in the face of this long-continued practical construction. For this court now to read into the statute a provision which that body chose not to write into it would constitute an uncalled-for intrusion into the sphere of the legislature.

[fol] 185] Even if I were to assume, however, that the statute does confer a power to review and revoke, I would still conclude for reversal. In my view, that portion of the statute here involved must fall before the constitutional guarantee that there be freedom of speech and press. The early decision of *Mutual Film Corp. v. Ohio Indus'l Comm.*, 236 U.S. 230, is urged as conclusively establishing that motion pictures are not within the First Amendment's coverage or protection. The consistent course of decision by the Supreme Court of the United States in recent years, however, persuades me that that early decision no longer has the force or authority here claimed for it.

We are confronted in this case with censorship in its baldest form—a licensing system requiring permission in

advance for the exercise of the right to disseminate ideas via motion pictures, and committing to the licensor a broad discretion to decide whether that right may be exercised. Insofar as the statute permits the state to censor a moving picture labelled "sacrilegious," it offends against the First and Fourteenth Amendments of the Federal Constitution, since it imposes a prior restraint—and, at that, a prior restraint of broad and un-defined limits—on freedom of discussion of religious matters. And, beyond that, it may well be that the restraint on the "sacrilegious" constitutes an attempt to legislate orthodoxy in matters of religious belief, contrary to the First Amendment's prohibition against laws "respecting an establishment of religion." (Cf. *Everson v. Board of Education*, 330 U.S. 1, 15; *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210). v

[fol. 186] The freedoms of the First Amendment are not, I appreciate, absolute, although they are as near to absolutes as our judicial and political system recognizes. But insofar as these freedoms are qualified, the qualification springs from the necessity of accommodating them to some equally pressing public need. Thus, some limited measure of restraint upon freedom of expression may be justified where the forum is the public street or the public square, where the audience may be a "captive" one, and where breaches of the peace may be imminent as the result of the use, or rather the abuse, of fighting words (Cf. *Dennis v. United States*, 341 U.S. 494, 503, et seq.; *Feiner v. New York*, 340 U.S. 315, 319; *Niemotko v. Maryland*, 340 U.S. 268; *Terminiello v. Chicago*, 337 U.S. 1; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572; *Cantwell v. Connecticut*, 310 U.S. 296, 308; *Schneider v. State*, 308 U.S. 147, 160). Here, there is no "captive" audience; only those see the pictures who wish to do so, and, then, only if they are willing to pay the price of admission to the theatre. Moreover, if subject matter furnishes any criterion for the exercise of a restraint, I know of no subject less proper for censorship by the state than the one here involved.

The Supreme Court has "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places" (*Kunz v.*

*New York*, 340 U.S. 290, 294; see, also, *Niemotko v. Maryland*, *supra*, 340 U.S. 268; *Saia v. New York*, 334 U.S. 558; *Cantwell v. Connecticut*, *supra*, 310 U.S. 296; *Hague v. C.I.O.*, 307 U.S. 496; *Lovell v. Griffin*, 303 U.S. 444). "The [fol. 187] State cannot of course forbid public proselytizing or religious argument merely because public officials do not approve the speaker's views. It must act in patent good faith to maintain the public peace, to assure the availability of the streets for their primary purposes of passenger and vehicular traffic, or for equally indispensable ends of modern community life" (see *Niemotko v. Maryland*, *supra*, 340 U.S. 268, 282, per FRANKFURTER, J., concurring.)

Invasion of the right of free expression must, in short, find justification in some overriding public interest, and the restricting statute must be narrowly drawn to meet an evil which the state has a substantial interest in correcting. (See *Feiner v. New York*, *supra*, 340 U.S. 315, 319; *Niemotko v. Maryland*, *supra*, 340 U.S. 268; *Winters v. New York*, 333 U.S. 507, 509; *Cantwell v. Connecticut*, *supra*, 310 U.S. 296, 307-308; *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 105). The statute before us is not one narrowly drawn to meet such a need as that of preserving the public peace or regulating public places. On the contrary, it imposes a general and pervasive restraint on freedom of discussion of religious themes in moving pictures, which cannot be justified on the basis of any substantial interest of the state (Cf. *Kunz v. New York*, *supra*, 340 U.S. 290; *Dennis v. United States*, *supra*, 341 U.S. 494, 508-509).

Over a century ago, the Supreme Court declared that "the law knows no heresy and is committed to the support of no dogma . . ." (*Watson v. Jones*, 80 U.S. 679, 728). Just as clearly, it is beyond the competency of government to prescribe norms of religious conduct and belief. That follows inevitably from adherence to the principles of the First Amendment. "In the realm of religious faith, and in that of political belief," it has been said (*Cantwell v. Connecticut*, *supra*, 310 U.S. 296, 310), "sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have

been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

The inherent indefinability, in its present context, of the term "sacrilege" is apparent upon the merest inquiry. At what point, it may be asked, does a search for the eternal verities, a questioning of particular religious dogma, take on the aspect of "sacrilege?" At what point does expression or portrayal of a doubt of some religious tenet become "sacrilegious"? Not even authorities or students in the field of religion will have a definitive answer, and certainly not the same answer. There are more than two hundred and fifty different religious sects in this country, with varying religious beliefs, dogmas and principles (See *Illinois ex rel. McCollum v. Board of Education, supra*, 333 U.S. 203, 227, per Frankfurter, J., concurring). With this great contrariety of religious views, it has been aptly observed that one man's heresy is another's orthodoxy, one's "sacrilege," another's consecrated belief. How and where draw the line between permissible theological disputation and "sacrilege?" what is orthodox, what sacrilegious? whose orthodoxy, to whom sacrilegious? In the very nature of things, what is "sacrilegious," will of necessity differ with the philosophy, the training, the education and the background of the particular censor of the moment, the determination whether a film is "sacrilegious" or not, must necessarily rest in the undiscoverable recesses of the official's mind.

[fol. 189] Any possible doubt that the term is essentially vague is dispelled by a reference to the variant and inconsistent definitions ascribed to it by the board of regents and by the Appellate Division and Judge Froessel.

Thus, the regents, frowning upon the dictionary definition as "technical,"<sup>2</sup> nevertheless assure us that "everyone knows what is meant by this term" and, by way of demon-

<sup>2</sup> A typical definition of "sacrilege" is that found in Webster's New International Dictionary [2d ed., 1948]:

strating that fact, proceed to define the word as describing a film which "affronts a *large segment* of the population;" offends the sensibilities by ridiculing and burlesquing anything "held sacred by the *adherents of a particular religious faith*"; is "offensive to the religious sensibilities of any element of society." Indeed, any semblance of either general meaning or specific content is, I suggest, abandoned by the regents themselves when they assert that, since "anything is only sacrilegious to those persons who hold the concept sacred" the opinions of non-believers are worthless." By such reasoning, the adherents of a particular dogma become the only judges as to whether that dogma has been offended! And, if that is so, it is impossible to fathom how any governmental agency such as the board of regents, composed as it is of laymen of different faiths, could possibly discharge the function of determining whether a particular film is "sacrilegious."

Judge Froessel and the Appellate Division state that the statutory proscription against the "sacrilegious" is intended to bar any "visual caricature of religious beliefs held sacred by one sect or another" (opinion of FROESSEL, J., p. 12). Though Judge Froessel also defines "sacrilegious" in terms of "attacking" or "insulting" religious [fol. 190] beliefs or treating them with "contempt, mockery, scorn and ridicule"— all words of ephemeral and indefinite content—the basic criterion appears to be whether the film treats a religious theme in such a manner as to offend the religious beliefs of any group of persons. If the film does have that effect, and it is "offered as a form of entertainment," it apparently falls within the statutory ban regardless of the sincerity and good faith of the producer of the film, no matter how temperate the treatment of the théme, and no matter how unlikely a public disturbance or breach of the peace.

The drastic nature of such a ban is highlighted by the fact that the film in question makes no direct attack on, or criticism of, any religious dogma or principle, and it is not

---

"the crime of stealing, misusing, violating or desecrating that which is sacred, or holy, or dedicated to sacred uses." (See, also, the New Catholic Dictionary [Vatican ed., 1929]).

claimed to be obscene, scurrilous, intemperate or abusive. Nor is there any evidence of any malicious purpose or intention on the part of the producers of the film to revile or even attack Catholic doctrine or dogma, nor any suggestion of any reasonable likelihood of a breach of the peace resulting from the film's exhibition. So broad, indeed, is the suggested criterion of "sacrilege" that it might be applied to any fair and temperate treatment of a psychological, ethical, moral or social theme with religious overtones which some group or other might find offensive to its "religious beliefs."

It is claimed that "the courts have had no problem either with the word 'sacrilegious' or with its synonym, 'profane'" (*Opinion of Froessel, J., supra*, p. 9). The cases to which reference is made, however, involved neither the "profane" in religion nor the "sacrilegious," and the simple fact is that the Supreme Court has never had occasion to pass upon either the one term or the other. The context in which the word "profane" appears in the cases cited (*Winters v. New York*, *supra*, 333 U.S. 507, 510; [fol. 191] *Chaplinsky v. New Hampshire*, *supra*, 315 U.S. 568, 572), as well as the authorities there relied upon (*Cantwell v. Connecticut*, *supra*, 310 U.S. 296, 309-310; *Chafee, Free Speech in the United States* [1941] pp. 149-150), make it evident that the term was used, not as a synonym for "sacrilegious," but as a substitute for "epithets or personal abuse," for swear words and for the other "insulting or 'fighting' words," which "by their very utterance inflict injury or tend to incite an immediate breach of the peace" and "are no essential part of any exposition of ideas" (*Chaplinsky v. New Hampshire*, *supra*, 315 U.S. 568, 572; see also *Cantwell v. Connecticut*, *supra*, 310 U.S. 296, 310; *Chafee, op. cit.*, p. 150). In short, the cases cited have nothing whatsoever to do with the "profane" in religion, and the judges who sat in them were not called upon to give the slightest thought or consideration to the subject with which we are now concerned.

The shortcomings of ambiguous epithets as rigid boundaries are great enough in temporal and political matters (cf. e.g., *Winters v. New York*, *supra*, 333 U.S. 507; *Dennis v. United States*, *supra*, 341 U.S. 494; *Jordan v. De George*,

341 U.S. 223; *Musser v. Utah*, 333 U.S. 95), but they are all the greater when the epithets trench upon areas of religious belief (see, e.g., *Kunz v. New York*, *supra*, 340 U.S. 290; *Saia v. New York*, *supra*, 334 U.S. 558, 567; *Cartwell v. Connecticut*, *supra*, 310 U.S. 296). Indeed, the Supreme Court has gone so far as to hold that the First Amendment's guarantee forbids prior restraint of public discussion that even "ridicules" or "denounces" any form of religious belief. (See *Kunz v. New York*, *supra*, 340 U.S. 290, and see, par. [fol. 192] particularly, concurring opinion of Frankfurter, J., reported in 340 U.S. at pp. 285-286). In a free society "all sects and factions, as the price of their own freedom to preach their views, must suffer that freedom in others." (*Kunz v. New York*, *supra*, 340 U.S. at p. 301, per Jackson, J., dissenting; see also, *Murdock v. Pennsylvania*, 319 U.S. 105, 116):

Were we dealing with speeches, with handbills, with newspapers or with books, there could be no doubt as to the unconstitutionality of that portion of the statute here under consideration. The constitutional guarantee of freedom of expression, however, is neither limited to the oral word uttered in the street or the public hall nor restricted to the written phrase printed in newspaper or book. It protects the transmission of ideas and beliefs, whether popular or not, whether orthodox or not. A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed by the "air-borne voice," the printed word or the "still" picture, it is put forward by a "moving" picture. The First Amendment does not ask whether the medium is visual, acoustic, electronic or some yet unheard-of device. It has readily accommodated itself to other products of inventive genius, to other advances in technology, such as the radio and television. If "The Constitution deals with substance, not shadows," if "Its inhibition was levelled at the thing, not the name" (*Cummings v. Missouri*, 4 Wall. 277, 325), then, surely, its meaning and vitality are not to be conditioned upon the mechanism involved. Of course, it may well be that differences in medium will give rise to different problems of accommodation of conflicting interests (see *Kovacs v. Cooper*, 336 U.S. 77, 96, per Frankfurter, J., concurring).

[fol. 193] But any such accommodation must necessarily be made in the light of fundamental constitutional safeguards.<sup>3</sup>

One reason for denying free expression to motion pictures, we are told, is that the movies are commercial. But newspapers, magazines and books are likewise commercially motivated, and that has never been an obstacle to their full protection under the First Amendment (See, e.g., *Grosjean v. American Press Co.*, 297 U.S. 233). Again, it is said, the fact that the moving picture conveys its thought or message in dramatic episodes or by means of a story or in a form that is entertaining, makes the difference. But neither novels, magazines nor comic books are made censorable because they are designed for entertainment or amusement. (See, e.g., *Winters v. New York*, *supra*, 333 U.S. 507, 510; *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 153). The Supreme Court made that plain in the *Winters* case, when it declared:

"We do not ~~sceede~~ to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." (333 U.S. at p. 510).

Whatever may have been true thirty-six years ago when the *Mutual Film case*, *supra*, 236 U.S. at 230, was decided, [fol. 194] there is no reason today for casting the motion picture beyond the barriers of protected expression. Learned and thoughtful writers so opine (see Chafee, *Free Speech in the United States* [1942], pp. 554 et seq.; Ernst, *The First Freedom*, p. 268; Kupfferman & O'Brien, *Motion*

<sup>3</sup> Whether, for instance, the statute (Education Law, § 122) may be sustained as valid even as a censorship measure insofar as its criterion is the narrow one of "obscenity," is not, of course, before us and need not be considered (Cf. *Chaplinsky v. New Hampshire*, *supra*, 315 U.S. 568, 572; *Near v. Minnesota*, 283 U.S. 697; *Ex parte Jackson*, 96 U.S. 727, 736).

*Picture Censorship*, 36 Cornell Law Quart. 273; Note, 60 Yale Law Journ. 696; Note, 49 Yale Journ. 87), and the Supreme Court itself has recently so declared (See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166; see, also, *Koxacs v. Cooper*, *supra*, 336 U.S. 77, 102, per Black, J., dissenting): As Chafee put it (*op. cit.*, p. 545), "In an age when 'commerce' in the Constitution has been construed to include airplanes and electromagnetic waves, 'freedom of speech' in the First Amendment and 'liberty' in the Fourteenth should be similarly applied to new media for the communication of ideas and facts. Freedom of speech should not be limited to the air-borne voice, the pen, and the printing press, any more than interstate commerce is limited to stagecoaches and sailing vessels." And, wrote the Supreme Court (*United States v. Paramount Pictures, Inc.*, *supra*, 334 U.S. 131, 166), "We have no doubt that moving pictures, like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment."

Every consideration points that conclusion. The *Mutual Film* case should be relegated to its place upon the history shelf. Rendered in a day before the guarantees of the Bill of Rights were held to apply to the states, and when moving pictures were in their infancy, the decision was obviously a product of the view that motion pictures did not express or convey opinions or ideas. Today, so far have times and films changed, some would deny protection for the opposite [fol. 195] reason, for the reason that films are too effective in their presentation of ideas and points of view. The latter motion is as unsupportable as the other and antiquated view; that the moving picture is a most effective mass medium for spreading ideas is, of course, no reason for refusing it protection. If only ineffectual expression is shielded by the Constitution, free speech becomes a fanciful myth. Few would dispute the anomaly of a doctrine that protects as freedom of expression comic books that purvey stories and pictures of "bloodshed and lust" (see *Winters v. New York*, *supra*, 333 U.S. 507, 510), light and racy magazine reading (see *Hannegan v. Esquire, Inc.*, *supra*, 327 U.S. 146, 153) and loudspeaker harangues (see *Saia v. New York*, *supra*, 334 U.S. 558), and yet denies that same protection to the moving picture.

Sincere people of unquestioned good faith may, as in this case, find a moving picture offensive to their religious sensibilities, but that cannot justify a statute which empowers licensing officials to censor the free expression of ideas or beliefs in the field of religion. "If there is any fixed star in our constitutional constellation," the Supreme Court has said (*Board of Education v. Barnette*, 319 U.S. 624, 642), "it is that no official, high or petty, can prescribe what shall be orthodox in polities, nationalism, religion or other matters of opinion . . . ."

The order of the Appellate Division should be reversed and the determination of the board of regents annulled.

Loughran, Ch. J., Lewis and Conway, JJ., concur with Froessel, J.; Desmond, J., concurs in separate opinion; Fuld, J., dissents in opinion in which Dye, J., concurs.

Order affirmed.

[fol. 196] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

PETITION FOR APPEAL—December 4, 1951

Considering itself aggrieved by the judgment and decree of this Court made and entered October 18, 1951, in the above proceedings, the Petitioner herein hereby prays that an appeal be allowed to the Supreme Court of the United States from said judgment and decree and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by Petitioner; and that the material parts of the record, proceedings, exhibits and papers upon which the said final judgment and decree were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, Ephraim S. London, Attorney for Petitioner-Appellant, Office & P. O. Address: 150 Broadway, New York, N. Y. (Seal).

[fol. 197] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL—December 6, 1951

Joseph Burstyn, Inc., Petitioner, having made and filed a petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause made and entered on October 18, 1951, and from each and every part thereof, and having presented its assignment of errors and prayer for reversal, and its statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same hereby is fixed in the sum of five hundred [fol. 198] (\$500) dollars, with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

John T. Loughran, Chief Judge of the Court of Appeals. (Seal.)

[fol. 199-200] Citation in usual form omitted in printing.

[fol. 201] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS—December 4, 1951

Joseph Burstyn, Inc., the Petitioner in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following Assignment of Errors upon which it will rely in its prosecution of the appeal from the judgment and decree of the Court of Ap-

peaks of the State of New York entered in the above cause on October 18, 1951.

The Court of Appeals of the State of New York erred in the following respects:

1. In holding Sections 120, 122, 129 and 131 of the New York Education Law (which prohibit the exhibition of a motion picture film found to be sacrilegious) are not laws respecting the establishment of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States.

[fol. 202] 2. In holding that Sections 120, 122, 129 and 131 of the New York Education Law (which prohibit the public exhibition of a motion picture film deemed sacrilegious by a state government agency) do not inhibit the free exercise of religion and are not for that reason repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

3. In holding that the denial of the right to publicly exhibit Petitioner's motion picture film *The Miracle* on the ground that it is sacrilegious was not a violation of the right of free exercise of religion guaranteed in the First and Fourteenth Amendments to the Constitution of the United States.

4. In holding that the Appellees' determination in this case that *The Miracle* is sacrilegious was not a religious judgment and therefore did not constitute governmental interference in religious matters, in violation of the First and Fourteenth Amendments to the Constitution of the United States.

5. In refusing to hold that the Appellees' suppression of *The Miracle* (by the revocation of the license permitting Appellant to exhibit it) on the ground that the film is sacrilegious is an attempted proscription of the norms of religious belief and religious conduct, in violation of the First and Fourteenth Amendments to the Constitution of the United States.

6. In refusing to hold that the Appellees' determination that *The Miracle* is sacrilegious denoted a preference of the views of one religious sect over that of others, in violation of the constitutional injunction against laws respecting the establishment of a religion.

[fol. 203] 7. In holding that Section 122 of the New York Education Law providing for the denial of a license to publicly exhibit motion picture films "if found sacrilegious" is not so vague and indefinite that its enforcement violated the "due process" clause of the Fourteenth Amendment to the Constitution of the United States.

8. In holding that the denial (by revocation) of a license to exhibit the film *The Miracle* on the ground that it is sacrilegious did not deprive Appellant of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

9. In holding that Section 122 of the New York Education Law (providing for denial of a license to exhibit motion pictures found sacrilegious) does not delegate legislative authority to the licensors, in violation of the Fourteenth Amendment to the Constitution of the United States.

10. In holding that the meaning of the term sacrilegious, as used in Section 122 of the New York Education Law, is clear and definite and does not (despite the absence of judicial construction or legislative or administrative standard for application) vest in the authorities charged with enforcement the power to determine its meaning and the limits of its application.

11. In holding that Sections 120, 122, 129 and 131 of the New York Education Law (which prohibit the exhibition of a motion picture film until a license therefor has been granted by a board of censors) do not abridge the freedom of speech or of the press, in contravention of the First and Fourteenth Amendments to the Constitution of the United States.

[fol. 204] 12. In holding that motion pictures are a form of entertainment and a business and not a medium of communication within the protection of the First and Fourteenth Amendments to the Constitution of the United States.

13. In holding that the denial of the right to publicly exhibit Petitioner's motion picture film *The Miracle* because the film was found sacrilegious by Appellees was not an abridgment of freedom of speech or of the press in contravention of the First and Fourteenth Amendments to the Constitution of the United States.

14. In holding that Petitioner-Appellant was estopped from asserting that Sections 120, 122, 129 and 131 of the New York Education Law abridge the freedom of the press or of speech in contravention of the First and Fourteenth Amendments to the Constitution of the United States.

Wherefore, Petitioner prays that the final decree and judgment of the Court of Appeals of the State of New York in this case be reversed, and for such other relief as the Court may deem just and proper.

Ephraim S. London, Attorney for Petitioner-Appellant, Office & P. O. Address, 150 Broadway, New York 38, N. Y.

[fol. 205] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

PRAECLYPE—December 10, 1951

To the Clerk of the Court of Appeals of the State of New York:

You will please prepare a transcript of the Record in the above entitled cause, to be transmitted to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

Proceedings in the Supreme Court of the State of New York

Record on Appeal

Page

1. Order to Show Cause .....	3
2. Petition of Joseph Burstyn, Inc. ....	6
3. Supporting Affidavit of Joseph Burstyn .....	20
4. Answer .....	28
5. Order Transferring Cause to Appellate Division .....	98
6. Stipulation with respect to Communications to the Board of Regents .....	130
[fol. 206] 7. Order of the Appellate Division Deny- ing Petition .....	137

8. Opinion of the Appellate Division .....	139
9. Order of the Appellate Division Granting Leave to the Court of Appeals .....	135

**Proceedings Before the Board of Regents of  
the State of New York**

(Returned with and made part of the Answer  
to the Petition)

10. Extract from Minutes of Meeting of the Board of Regents .....	42
11. Order to Show Cause (issued by the Board of Regents) .....	44
12. Affidavit of Joseph Burstyn, submitted to Regents .....	66

Description of Exhibits and Excerpts there-  
from, attached to Affidavit of Joseph  
Burstyn

Printed Copies  
of Exhibits  
pp. i-xxii

**Exhibits Attached to Affidavit of Joseph Burstyn**

Exhibit 1 .....	72
Exhibit 2 .....	74
Exhibit 3 .....	77
Exhibit 6 .....	5
Exhibit 7 .....	16
Exhibit 8 .....	18
Exhibit 9 .....	19
Exhibit 12 .....	23
Exhibit 13 .....	24
Exhibit 14 .....	26
Exhibit 16 .....	28
Exhibit 20 .....	37
Exhibit 21 .....	39
Exhibit 23 .....	42
Exhibit 26 .....	46
Exhibit 34 .....	63
Exhibit 53-A .....	90

Exhibit 53-E .....	96
Exhibit 63 .....	125
Exhibit 64 .....	127
Exhibit 75 .....	150
Exhibit 76 .....	151
 13. Letter from Ephraim S. London to Charles A. Brind, Jr., and Reply .....	90
14. Report of Special Committee of the Board of Regents .....	79
[fol. 207] 15. Report and Order of the Board of Regents .....	87
 <b>Proceedings in the Court of Appeals of the State of New York</b>	
16. Notice of Appeal to the Court of Appeals .....	133
17. Stipulation with respect to Exhibits .....	149
18. Order of the Court of Appeals Affirming Judg- ment of the Appellate Division .....	
19. Order of the Supreme Court of the State of New York Entering Judgment of the Court of Appeals .....	
20. Opinion of the Court of Appeals .....	
21. Petition for Appeal to the Supreme Court of the United States .....	
22. Order Allowing Appeal .....	
23. Citation on Appeal .....	
24. Assignment of Errors .....	
25. Statement as to the Jurisdiction of the Supreme Court .....	
26. Statement directing Attention to Rule 12, Para- graph 3, of the Rules of the Supreme Court .....	
27. Acknowledgment of Receipt and Acceptance of Service of Papers on Appeal to the United States Supreme Court, and of this Praecept .....	
28. This Praecept .....	

The film of the motion picture *The Miracle* shall be physically delivered and deposited, in accordance with Rule 18, paragraph 1, of the Rules of the Supreme Court of the United States, and shall, if request is made, be exhibited to

the Supreme Court of the United States as an Exhibit on this appeal.

The transcript of the Record to be filed in the Supreme Court of the United States shall be prepared as required [fol. 208] by law and the Rules of this Court and the Rules of the Supreme Court of the United States, to be filed in the office of the Clerk of the Supreme Court of the United States in Washington, D. C., on or before the 15th day of January, 1952.

(Sgd.) Ephraim S. London, Attorney for Petitioner-Appellant, 150 Broadway, New York 38, N. Y.

[fol. 209] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

COUNTER-PRAECLPPE—December 18, 1951

To the Clerk of the Court of Appeals of the State of New York:

In preparing the transcript of record of the above-entitled cause on the appeal of Petitioner-Appellant, please include in said transcript the following:

Proceedings in the Supreme Court of the State of New York

Record on Appeal  
Page

1. Order to Show Cause (Special Term, Exhibit 3)	47
2. Minutes of meeting of a sub-committee of the Board of Regents of the State of New York held at the building of the Association of the Bar of the City of New York on January 30, 1951 at 3 P.M. (Special Term, Exhibit 4)	50
3. Statement of John C. Farber, Counsel for Joseph Burstyn, Inc. (Special Term, Exhibit 5)	63

4. Italian dialogue, English translations  
and English sub-titles (Special  
Term, Exhibit '12) . . . . .
- [fols. 210-212] 5. Acknowledgement of re-  
ceipt of counter-praecipe.
6. This counter-praecipe.

The communications received by the Board of Regents prior to its determination in this matter to which reference is made in the stipulation designated as No. 6 of the proceedings in the Supreme Court in the praecipe of petitioner-appellant, shall be physically delivered and deposited in accordance with Rule 18, paragraph 1 of the Rules of the Supreme Court of the United States, and shall be exhibited to the Supreme Court of the United States as an exhibit on this appeal.

Dated, Albany, N. Y., December 18, 1951.

Nathaniel L. Goldstein, Attorney General of the State of New York, State Capitol, Albany, New York; Wendell P. Brown, Solicitor General of the State of New York, and Charles A. Brind, Jr., Counsel to the Board of Regents of the University of the State of New York and State Education Department, Education Building, Albany, New York, Attorneys for Respondents-Appellees.

[fol. 213] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 522

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION  
OF RECORD—Filed January 22, 1952

The Appellant adopts its Assignment of Errors heretofore filed herein as its statement of the Points to be Relied upon in this Court.

Appellant designates the following portions of the Record as filed in this Court as necessary to be printed for the consideration of the points to be relied upon:

**Proceedings in the Supreme Court of the State of New York**

	Record on Appeal
	Page
1. Order to Show Cause .....	3
2. Petition of Joseph Burstyn, Inc. ....	6
3. Supporting Affidavit of Joseph Bur- styn .....	20
4. Answer .....	28
5. Order Transferring Cause to Appel- late Division .....	98
6. Stipulation with respect to Communi- cations to the Board of Regents .....	130
[fol. 214] 7. Order of the Appellate Divi- sion Denying Petition .....	137
8. Opinion of the Appellate Division .....	139

**Proceedings before the Board of Regents of the State of  
New York**

(Returned with and made part of the Answer to the Petition)

9. Extract from Minutes of Meeting of the Board of Regents .....	42
10. Order to Show Cause (issued by the Board of Regents) .....	44
11. Affidavit of Joseph Burstyn, sub- mitted to Regents .....	66

**Printed Copies  
of Exhibits**

**Description of Exhibits and Excerpts  
therefrom, attached to Affidavit of  
Joseph Burstyn .....**

pp. 1 thru xxii

**Exhibits Attached to Affidavit of  
Joseph Burstyn**

Exhibit 1 .....	73
Exhibit 2 .....	75
Exhibit 3 .....	78

Exhibit 6	5
Exhibit 7	16
Exhibit 8	18
Exhibit 9	19
Exhibit 12	23
Exhibit 13	24
Exhibit 14	26
Exhibit 16	28
Exhibit 23	42
Exhibit 26	46
Exhibit 34	63
Exhibit 53-A	90
Exhibit 53-E	96
Exhibit 75	150
Exhibit 76	151
12. Letter from Ephraim S. London to Charles A. Brind, Jr., and Reply	90
13. Report and Order of the Board of Regents	87
[fol. 215] Proceedings in the Court of Appeals of the State of New York	
14. Notice of Appeals to the Court of Appeals	133
15. Stipulation with respect to Exhibits	149
16. Order of the Court of Appeals Affirming Judgment of the Appellate Division	
17. Order of the Supreme Court of the State of New York Entering Judgment of the Court of Appeals	
18. Opinion of the Court of Appeals	
19. Petition for Appeal to the Supreme Court of the United States	
20. Order Allowing Appeal	
21. Citation on Appeal	
22. Assignment of Errors	
23. Statement as to the Jurisdiction of the Supreme Court	

24. Statement directing Attention to Rule 12, Paragraph 3, of the Rules of the Supreme Court
25. Acknowledgment of Receipt and Acceptance of Service of Papers on Appeal to the United States Supreme Court, and of Praecept
26. Praecept
27. Counter-Praecept

Dated, New York, January 15, 1952.

Ephraim S. London, Counsel for Petitioner-Appellant, 150 Broadway, New York 38, N. Y.

---

[fol. 216] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

STATE OF NEW YORK,

County of New York, ss:

Agatha J. McCurrach, being duly sworn, deposes and says that she is employed by the attorney for the above named Petitioner-Appellant herein. That on the 15th day of January, 1952, she served the within Statement of Points to be Relied upon and Designation of Record upon Dr. Charles A. Brind, Jr., counsel for the above named Respondents-Appellees by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post-Office Box regularly maintained by the United States Government at 150 Broadway, New York, in said County of New York, directed to said counsel for the Respondents-Appellees at State Education Building, Albany, N. Y., that being the address within the state designated by him for that purpose upon the preceding papers in this action, or the place where he then kept an office, between which places there

[fols. 217-220] then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Agatha J. McCurrach.

Sworn to before me this 21st day of January, 1952.  
 Ephraim London, Notary Public, State of New York, No. 31-7589800. Qualified in New York County. Cert. Filed with N. Y. Co. Clk. & Reg. Commission Expires March 30, 1952.

[fol. 221] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM

195

[Title omitted]

COUNTER-DESIGNATION OF RECORD—Filed January 25, 1952

The Respondents-Appellees designate the following additional portions of the record as filed in this Court as necessary to be printed for the consideration of the appeal herein:

Proceedings in the Supreme Court of the State of New York

	Record on Appeal Page
1. Order to Show Cause (Special Term, Exhibit 3)	47
2. Minutes of meeting of a sub-committee of the Board of Regents of the State of New York held at the building of the Association of the Bar of the City of New York on January 30, 1951 at 3 P. M. (Special Term, Exhibit 4)	50
3. Statement of John C. Farber, Counsel for Joseph Burstyn, Inc. (Special Term, Exhibit 5)	63
4. Italian dialogue, English translations and English sub-titles (Special Term, Exhibit 12)	101

[fol. 222] Proceedings Before the Board of Regents of the State of New York

(Returned with and Made a Part of the Answer to the Petition)

5. Report of Special Committee of the Board of Regents.

79

Dated, Albany, N. Y., January 23, 1952.

Nathaniel L. Goldstein, Attorney General of the State of New York, State Capitol, Albany, New York; Wendell P. Brown, Solicitor General of the State of New York, of Counsel, and Charles A. Brind, Jr., Counsel to the Board of Regents of the University of the State of New York and State Education Department, Education Building, Albany, New York, Attorneys for Respondents-Appellees.

[fols. 223-225] Acknowledgment of Service—(Omitted in Printing)

[fol. 226] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—February 4, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

(236)

LIBRARY  
SUPREME COURT, U.S.

Office-Supreme Court, U.S.  
FILED

JAN 10 1952

CHARLES ELMORE COPIER  
CLEAR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 522

JOSEPH BURSTYN, INC.,

*Appellant,*

*vs.*

LEWIS A. WILSON, COMMISSIONER OF EDUCATION OF THE  
STATE OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

EPHRAIM S. LONDON,  
*Counsel for Appellant.*

80

# INDEX

## SUBJECT INDEX.

	Page
Statement as to jurisdiction .....	1
Dates of judgment sought to be reviewed and of this appeal .....	2
Opinion below .....	2
The statutory provisions sustaining jurisdiction .....	3
The statutes involved .....	3
Statement as to the nature of the case .....	4
The constitutional questions involved:	
The manner in which the questions were raised and the decision in favor of the validity of the statutes .....	6
The questions involved are substantial .....	12
Exhibit "A"—Opinion of the Court of Appeals of New York .....	20
Exhibit "B"—Opinion of the Appellate Division of the Supreme Court of New York .....	48
Exhibit "C"—Applicable statutes .....	55

## TABLE OF CASES CITED

<i>Abie State Bank v. Bryan</i> , 282 U.S. 765	18
<i>Bacardi Corp. v. Domenech</i> , 311 U.S. 150	18
<i>Buck v. Kuykendall</i> , 267 U.S. 307	18
<i>Cantwell v. Connecticut</i> , 310 U.S. 296	8, 15, 30, 40, 41, 44
<i>Everson v. Board of Education</i> , 330 U.S. 1	10, 14, 30, 40
<i>Gitlow v. New York</i> , 268 U.S. 652	17
<i>Grosjean v. American Press Co.</i> , 297 U.S. 233	15, 17, 46
<i>Hamilton v. Regents of the University of California</i> , 292 U.S. 245	3
<i>Hannegan v. Esquire, Inc.</i> , 327 U.S. 146	11, 17, 46, 47
<i>Herbert v. Louisiana</i> , 272 U.S. 312	12
<i>Joseph Burstyn, Inc. v. Wilson</i> , 278 App. Div. 253	2
<i>Kovacs v. Cooper</i> , 336 U.S. 77	33, 46
<i>Kunz v. New York</i> , 340 U.S. 290	8, 15, 40, 41, 45

	Page
<i>Lovell v. City of Griffin</i> , 303 U.S. 444	3, 8, 15
<i>Murdock v. Pennsylvania</i> , 319 U.S. 105	45
<i>Mutual Film Corp. v. Industrial Commission of Ohio</i> , 236 U.S. 230	15-16, 22, 39
<i>Near v. Minnesota</i> , 283 U.S. 697	15, 17, 45
<i>O'Brien v. Wheelock</i> , 184 U.S. 450	18
<i>People ex rel. McCollum v. Board of Education</i> , 333 U.S. 203	3, 14, 15, 30
<i>Senn v. Tile Layers Union</i> , 301 U.S. 468	3
<i>Skiriotes v. Florida</i> , 313 U.S. 69	12
<i>Thomas v. Collins</i> , 323 U.S. 516	17
<i>Union Pacific R. Co. v. Public Service Comm.</i> , 248 U.S. 67	18
<i>United States v. Cohen Grocery Co.</i> , 255 U.S. 81	12
<i>United States v. Paramount Pictures</i> , 334 U.S. 131, 16, 17, 32, 46, 47, 50	
<i>Winters v. New York</i> , 333 U.S. 507, 3, 8, 11, 12, 17, 27, 34, 44, 46, 47	

#### STATUTES CITED

"Annals of the American Academy of Political & Social Science," Nov., 1947, pp. 4, 5"	18
<b>Constitution of the United States:</b>	
First Amendment,	
7, 9, 10, 11, 13, 15, 16, 17, 21, 31, 35, 39, 40, 44, 46, 49	
Fifth Amendment	7
Fourteenth Amendment,	
6, 7, 9, 12, 13, 15, 16, 17, 21, 39, 46, 49	
<b>New York State Education Law:</b>	
Section 120	55
Section 122	26, 55
Section 129	55
Section 131	55
<b>United States Code, Title 28, Section 1257(2)</b>	3

COURT OF APPEALS OF THE STATE OF NEW YORK

---

IN THE MATTER OF THE APPLICATION OF JOSEPH  
BURSTYN, INC.,

*Petitioner-Appellant,*

FOR AN ORDER PURSUANT TO ARTICLE 78 OF THE CIVIL  
PRACTICE ACT,

*against*

LEWIS A. WILSON, COMMISSIONER OF EDUCATION OF THE  
STATE OF NEW YORK, AND JOHN P. MYERS, WILLIAM  
J. WALLIN, WILLIAM LELAND THOMPSON,  
GEORGE HOPKINS BOND, W. KINGSLAND MAGY,  
EDWARD R. EASTMAN, WELLES V. MOOT, CARO-  
LINE WERNER GANNETT, ROGER W. STRAUS,  
DOMINICK F. MAURILLO, JOHN F. BROSMAN, AND  
JACOB L. HOLTZMANN, AS REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK,

*Respondents*

**STATEMENT AS TO JURISDICTION**

---

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, Petitioner-Appellant submits this statement showing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or order of the Court of Appeals of the State of New York made in this cause on October 18, 1951.

## Dates of Judgment Sought to Be Reviewed and of This Appeal.

The judgment and order of the Court of Appeals of the State of New York sought to be reviewed affirmed the order of the Appellate Division of the Supreme Court for the Third Judicial Department. The judgment and order of the Court of Appeals and the majority concurring and dissenting opinions of the Judges of that Court were filed on October 18, 1951. The remittitur of the Court of Appeals was issued to the Supreme Court of the State of New York, Albany County on October 18, 1951, and order of remittitur was filed in the Supreme Court of the State of New York, Albany County on November 23, 1951, and by that order, the order and judgment of the Court of Appeals was made the order and judgment of the Supreme Court of the State of New York, Albany County.

The application for appeal to the United States Supreme Court was presented to the Chief Judge of the Court of Appeals of the State of New York on December 5, 1951.

The Court of Appeals of the State of New York is the state court of last resort. Its judgment in this case is final, both in form and substance, and disposes of all of the elements of the controversy in the court below.

### Opinion Below

The opinion of the Court of Appeals of the State of New York in this cause has not yet been printed in the official reports. A copy of the opinion is attached hereto as Exhibit A. The opinion of the Appellate Division of the Supreme Court of the State of New York, for the Third Department, in this cause is reported in 278 App. Div. 253, and a copy is attached as Exhibit B.

### The Statutory Provision Sustaining Jurisdiction

This cause was instituted to review the Appellees' cancellation of a license issued for the public exhibition of the motion picture *The Miracle*, and to enjoin the Appellees from interfering with the showing of the film. The Appellees acted under authority purportedly conferred by various sections of the New York State Education Law. Appellant drew into question the validity of the statutes on the ground that they were repugnant to the Constitution of the United States. The decision of the highest court of the State of New York in this cause was in favor of the validity of the challenged statutes.

The jurisdiction of the Supreme Court of the United States to review the judgment and decree by direct appeal is conferred by Title 28 of the United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court: *Hamilton v. Regents of the University of California*, 293 U. S. 245; *Senn v. Tile Layers Union*, 301 U. S. 468; *Lovell v. City of Griffin*, 303 U. S. 444; *People ex rel. McCollum v. Board of Education*, 333 U. S. 203; *Winters v. New York*, 333 U. S. 507.

### The Statutes Involved

The validity of the following statutes is involved: New York State Education Law, Sections 120, 122, 129, 131. The statutes prohibit the exhibition of a motion picture film in any theater in the State of New York unless the film is licensed by the Motion Picture Division of the Department of Education or its director. The sections provide for the denial of a license if the Motion Picture Division or its director find a film to be indecent, immoral or blasphemous. The sanction for exhibition of an unlicensed film is criminal.

prosecution. The sections are set out verbatim in Exhibit C.

Appellant contends and contended in this case that the statutes referred to are repugnant to the Constitution of the United States. The decision rendered by the court below was in favor of their validity.

#### **Statement as to the Nature of the Case**

This case involves the ban in New York State of the motion picture The Miracle. The ban was effected by the revocation by Appellees of licenses for the exhibition of the film. The statutes, the validity of which is questioned in this appeal, prohibit the exhibition of an unlicensed film in any theaters within the State of New York. Violation of the statute is a criminal offense.

The Miracle was produced in Italy in 1948, and its dialogue is in Italian. It was imported to the United States and was licensed for exhibition as a foreign language film in 1949 (fol. 21). Thereafter Petitioner-Appellant, herein-after referred to as the Distributor, purchased the American rights to The Miracle, added English subtitles, and combined it with two other films for presentation under the title Ways of Love (fol. 21, 22). The film trilogy Ways of Love received a separate license for exhibition in New York in 1950 (fol. 22).

The film itself is a part of the record on appeal. It is in brief the story of a simple-minded, deeply religious woman who is taken advantage of by a stranger she believes to be St. Joseph. When the woman learns she is with child, she imagines it was immaculately conceived. The picture ends when the child is born.

There is nothing in the dialogue or action or acting in the picture that would suggest that it is to be given any other than a literal meaning, or that it was intended as any-

thing more than the story of the abuse of a deep and simple faith. That was the intent of the writer, the producer, director and professional cast, all of whom are devout Roman Catholics (fol. 203).

The Miracle was first shown in Rome where religious censorship exists, and it was not condemned (fol. 204-206, Exhibits 1-3). The review of the Vatican newspaper L'Osservatore Romano made no criticism on religious grounds (fol. 206, Exhibit 4). When The Miracle was brought to America, it was passed by the U. S. Customs (fol. 206). It was also passed by the Motion Picture Division (the New York State film censorship board) on two separate occasions, first, when the film was separately licensed in 1949, and again in 1950, when licensed as a part of Ways of Love.

After the second license was issued, the Appellant spent a considerable sum for advertising and promoting Ways of Love and in preparing for its exhibition at a first run theater in New York City (fol. 62-3). The film was first shown December 12, 1950, and was an immediate success (fol. 63). It was approved and recommended by the National Board of Review of Motion Pictures (fol. 206), and was thereafter designated the best foreign language film of 1950 by the New York Film Critics (fol. 63-4).

After the picture opened, the Legion of Decency, a Roman Catholic censorship board, initiated a protest against it (fol. 211). The Legion interpreted the picture as a mockery of the immaculate conception of Jesus Christ (fol. 203). Dr. Flick, the director of the Motion Picture Division, was asked to reexamine the film, and after reexamining it, he stated that he did not find it objectionable and refused to take further action (fol. 64-5, 201).

After Dr. Flick refused to take action with respect to the film, his superiors the Appellees, issued an order rescinding the license for The Miracle on the ground that it is sacri-

legious (fol. 56). These proceedings were then instituted to annul the determination of the Appellees, the Regents of the State of New York, and to restrain them from interfering with the exhibition of the film. The proceedings were transferred for disposition to the Appellate Division of the Supreme Court of the State of New York for The Third Judicial Department. That Court confirmed the Regents' determination (fol. 409-14). An appeal from the order of the Appellate Division was taken to the Court of Appeals of the State of New York. The Court of Appeals affirmed the order of the Appellate Division, with two judges dissenting. This appeal is taken from the judgment of the Court of Appeals, which was made in this cause on October 8, 1951. There is no further appeal or proceeding which can be taken in this cause in the courts of the State of New York.

**The Constitutional Questions Involved: The Manner in Which the Questions Were Raised and the Decision in Favor of the Validity of the Statutes.**

The constitutional questions involved in this appeal are:

- (1) Is the statute under which petitioner's film was banned so vague and indefinite and its meaning so uncertain that its enforcement violates the due process clause of the Fourteenth Amendment?
- (2) Does the statute as construed violate the constitutional warranty of separate church and state?
- (3) Do the statutes infringe the right of free exercise of religion?
- (4) Do the statutes impose an unconstitutional restraint on freedom of expression and communication?

The questions were raised in the petition by which the proceedings were initiated. The petition alleges that the

revocation of the license for the exhibition of *The Miracle* "deprive petitioner of its property rights in the aforesaid licenses without due process of law" and that appellees acted "in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States" (fols. 34, 35).

The questions were also raised on the arguments made before, and in the briefs submitted to, the Appellate Division of the Supreme Court of the State of New York (which heard this cause as a court of first instance) and the Court of Appeals of the State of New York. Both courts passed upon the questions raised and both upheld the validity of the statutes.

The majority opinion in the Court of Appeals stated with respect to the question hereinbefore numbered (1):

*"Second:* To the claim that the statute delegates legislative power without adequate standards, a short answer may be made. Section 122 of the Education Law provides that a license shall be issued for the exhibition of a submitted film, 'unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime.' Only the word 'sacrilegious' is attacked for indefiniteness. The dictionary, however, furnishes a clear definition thereof, were it necessary to seek one, as, e.g., 'the act of violating or profaning anything sacred' (*Funk & Wagnall's New Standard Dictionary*, 1937). There is no difficulty in recognizing the limits of the criterion thus established, and the courts have had no problem either with the word 'sacrilegious' or with its synonym, 'profane,'" (Exhibit A at p. 8.)

The dissenting opinion, in discussing that question, stated:

"The Supreme Court has 'consistently condemned licensing systems which vest in an administrative

8

official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places' (*Kunz v. New York*, 340 U. S. 290, 294; see, also, *Niemotko v. Maryland*, *supra*, 340 U. S. 268; *Saia v. New York*, 334 U. S. 558; *Cantwell v. Connecticut*, *supra*, 310 U. S. 296; *Hague v. C. I. O.*, 307 U. S. 496; *Lovell v. Griffin*, 303 U. S. 444).

"Invasion of the right of free expression must, in short, find justification in some overriding public interest, and the restricting statute must be narrowly drawn to meet an evil which the state has a substantial interest in correcting. (See *Feiner v. New York*, *supra*, 340 U. S. 315, 319; *Niemotko v. Maryland*, *supra*, 340 U. S. 268; *Winters v. New York*, 333 U. S. 507, 509; *Cantwell v. Connecticut*, *supra*, 310 U. S. 296, 307-308; *Thornhill v. Alabama*, 310 U. S. 88, 97-98, 105). The statute before us is not one narrowly drawn to meet such a need as that of preserving the public peace or regulating public places. On the contrary, it imposes a general and pervasive restraint on freedom of discussion of religious themes in moving pictures, which cannot be justified on the basis of any substantial interest of the state (Cf. *Kunz v. New York*, *supra*, 340 U. S. 290; *Dennis v. United States*, *supra*, 341 U. S. 494, 508-509)." (Exhibit A, at pp. 25-26.)

• • • • •

"The drastic nature of such a ban is highlighted by the fact that the film in question makes no direct attack on, or criticism of, any religious dogma or principle, and it is not claimed to be obscene, scurrilous, intemperate or abusive. Nor is there any evidence of any malicious purpose or intention on the part of the producers of the film to revile or even attack Catholic doctrine or dogma, nor any suggestion of any reasonable likelihood of a breach of the peace resulting from the film's exhibition. So broad, indeed, is the suggested criterion of 'sacrilege' that it might be applied to any fair and temperate treatment of a psychological, ethical, moral or social theme with religious overtones

9

which some group or other might find offensive to its  
'religious beliefs.' " (Exhibit A at p. 29)

The majority opinion in the Court of Appeals stated with respect to the questions hereinbefore numbered (2) and (3):

"Fourth; It is further urged that a license may not be denied or revoked on the ground of sacrilege, because that would require a religious judgment on the part of the censoring authority and thus constitute an interference in religious matters by the State. In this connection, it is also urged that freedom of religion is thereby denied, since one man's sacrilege is another man's dogma, and one may thus be prevented from propagating his own religious views by means of motion pictures. The latter argument is specious when applied to motion pictures offered to the public for general exhibition as a form of entertainment, . . .

"Nor is it true that the Regents must form religious judgments in order to find that a film is sacrilegious . . ." (Exhibit A, pp. 11-12)

The dissenting opinion, in discussing the questions hereinbefore numbered (2) and (3), stated:

"We are confronted in this case with censorship in its boldest form—a licensing system requiring permission in advance for the exercise of the right to disseminate ideas *via* motion pictures, and committing to the licensor a broad discretion to decide whether that right may be exercised. Insofar as the statute permits the state to censor a moving picture labeled 'sacrilegious,' it offends against the First and Fourteenth Amendments of the Federal Constitution, since it imposes a prior restraint—and, at that, a prior restraint of broad and undefined limits—on freedom of discussion of religious matters. And, beyond that, it may well be that the restraint on the 'sacrilegious' constitutes an attempt to legislate orthodoxy in mat-

ters of religious belief, contrary to the First Amendment's prohibition against laws 'respecting an establishment of religion.' (Cf. *Everson v. Board of Education*, 330 U. S. 1, 15; *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 210). (Exhibit A, at p. 24)

"Sincere people of unquestioned good faith may, as in this case, find a moving picture offensive to their religious sensibilities, but that cannot justify a statute which empowers licensing officials to censor the free expression of ideas or beliefs in the field of religion. 'If there is any fixed star in our constitutional constellation,' the Supreme Court has said (*Board of Education v. Barnette*, 319 U. S. 624, 642), 'it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion . . .'" (Exhibit A, at p. 34)

The majority opinion of the Court of Appeals held with respect to the question numbered (4) herein:

"*Fifth*: Petitioner finally argues that the statute is unconstitutional *in toto*; that motion pictures are to be treated as the press generally, and may not be subjected to censorship or prior restraint. While it may not be heard in this respect, inasmuch as it has sought and obtained benefits under the statute, and even now seeks to retain licenses granted (*Fahey v. Mallonee*, 332 U. S. 245, 255; *Shepherd v. Mount Vernon Trust Co.*, 269 N. Y. 234, 244-247), we shall dispose of this argument upon the merits.

"Whether motion pictures are *sui generis* or a very special classification of the press becomes a question for the academicians, once it is recognized that there is a danger presented and met by legislation appropriate to protect the public safety, yet narrow enough as not otherwise to limit freedom of expression. If

there is any one proposition for which the free speech cases may be cited from *Schenck v. United States* (249 U. S. 47) to *Dennis v. United States*, and *Breard v. Alexandria*, decided June 4, 1951, it is that freedom of speech is not absolute, but may be limited when the appropriate occasion arises" (Exhibit A, pp. 14-16)

The dissenting opinion, discussing that question, stated:

"Were we dealing with speeches, with handbills, with newspapers or with books, there could be no doubt as to the unconstitutionality of that portion of the statute here under consideration. The constitutional guarantee of freedom of expression, however, is neither limited to the oral word uttered in the street or the public hall nor restricted to the written phrase printed in newspaper or book. It protects the transmission of ideas and beliefs, whether popular or not, whether orthodox or not. A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed by the 'air-borne voice,' the printed word or the 'still' picture, it is put forward by a 'moving' picture. The First Amendment does not ask whether the medium is visual, acoustic, electronic or some yet unheard-of device. It has readily accommodated itself to other products of inventive genius, to other advances in technology, such as the radio and television. If 'The Constitution deals with substance, not shadows,' if 'Its inhibition was levelled at the thing, not the name' (*Cummings v. Missouri*, 4 Wall. 277, 325), then, surely, its meaning and vitality are not to be conditioned upon the mechanism involved. (Exhibit A, p. 31)

\* \* \* \* \*

"Few would dispute the anomaly of a doctrine that protects as freedom of expression comic books that purvey stories and pictures of 'bloodshed and lust' (see *Winters v. New York*, *supra*, 333 U. S. 507, 510), light and raucous magazine reading (see *Hannegan v. Esquire, Inc.*, *supra*, 327 U. S. 146, 153) and loud-

speaker harangues (see *Saia v. New York, supra*, 334 U. S. 558), and yet denies that same protection to the moving picture." (Exhibit A, at p. 34)

### The Questions Involved Are Substantial

I. *The statute under consideration is so vague and indefinite, and its meaning so uncertain, that its enforcement violated the due process clause of the Fourteenth Amendment.* The challenged statutes provide that a film shall be denied a license (i. e., shall not be publicly exhibited) "if . . . sacrilegious." Presentation of a film in a theater without a license is made a penal offense. The word *sacrilegious* is not defined in the statute, or in any rule promulgated by the enforcement agency, and no reported opinion of any court in the United States, prior to that rendered in the instant case, has been found in which the term is construed.

The Court of Appeals in this case defined *sacrilegious* to mean "the act of violating or profaning anything sacred" (Exhibit A, p. 8), thus fixing the meaning of the statute for the purposes of this case. *Herbert v. Louisiana*, 272 U. S. 312, 317; *Skiriotes v. Florida*, 313 U. S. 69, 73; *Winters v. New York*, 333 U. S. 507, 514. The definition does not delimit the application of the term. "It leaves open the widest conceivable inquiry, the scope of which no one can foresee, the result of which no one can . . . adequately guard against." *United States v. Cohen Grocery Co.*, 255 U. S. 81, 89. What is meant by "anything sacred"? Are only tangible things such as physical symbols, icons, the Cross of Jesus, the Star of David, included, or does the term also embrace ideas, beliefs, customs, ceremonies? What acts of violation or profanation are within the purview of the statute? Are expressions of disbelief included? In the dissenting opinion in this case, Judges Fuld and Dye also ask, "At what point, . . . does a search for the

eternal verities, a questioning of particular religious dogma, take on the aspect of 'sacrilege'? At what point does expression or portrayal of a doubt of some religious tenet become 'sacrilegious'? Not even authorities or students in the field of religion will have a definite answer, and certainly not the same answer" (Exhibit A, p. 27).

In the absence of any judicial construction of the word "sacrilegious" and the creation of any standards, it is impossible to determine in advance what is prohibited and what is permitted by statute. As Judge Fuld wrote herein, "In the very nature of things, what is 'sacrilegious,' will of necessity differ with the philosophy, the training, the education and the background of the particular censor of the moment, the determination whether a film is 'sacrilegious' or not, must necessarily rest in the undiscoverable recesses of the official's mind" (Exhibit A, p. 27).

The statutes, as construed in this case, thus empowered the appellees to prohibit the showing of a film if according to their own convictions it violated anything which they deemed sacred. The complete absence of criteria of application compelled those charged with enforcement of the law to determine the extent and scope of their powers, and the circumstances under which the powers could be exercised. The negative exercise of the powers conferred by the statute results in the deprivation of substantial property rights (i. e. the right to exhibit a film for profit) and possible criminal prosecution. The repugnance of the statute to the Fourteenth Amendment would therefore seem clear.

*II. The statute as construed violates the constitutional warrants of separate church and state and of freedom of religion.* The court below held that the statute was intended to prevent offense against religion. If so, it is a law to aid religions directly within the ban of the First and Fourteenth Amendments. The fact that the section purports to protect

all faiths against sacrilege is not controlling. The same point was urged and rejected in *People ex rel. McCollum v. Board of Education*, 333 U. S. 203. The Constitutional Amendments forbid not only the preference of one religion over another, but also impartial assistance to all religions. *Everson v. Board of Education*, 330 U. S. 1, 59; *People ex rel. McCollum v. Board of Education*, 333 U. S. 203, 210.

The Appellate Division of the Supreme Court conceded in its opinion below that any construction of the statute "which denotes a preference for one sect would be inconsistent with the constitutional mandate of complete separation of Church and State." Unquestionably such a preference was indicated in this case. A minority group within the Roman Catholic Church found The Miracle sacrilegious. Leaders and ministers of Episcopalian, Presbyterian, Congregationalist, Unitarian, Evangelical and Reformed Churches found the film deeply religious (fols. 208-9, Exhibits 6-~~55~~). All Protestant ministers who expressed themselves publicly found that the film was not sacrilegious (see Exhibit A, at p. 20). In holding The Miracle sacrilegious, the Regents thus were adopting and enforcing the opinion of one segment of a religious group as opposed to that of many others.

The statute, in directing the Regents and the censors to determine whether a film is sacrilegious, requires the officials to make a purely religious judgment—and such judgment is made the basis for official action. Obviously nothing may be held sacrilegious unless judged according to a particular religious doctrine. As the Regents asserted in this case, "anything is only sacrilegious to those persons who hold the concept sacred" (Exhibit A, at p. 28). The authorities charged with enforcement of the statute must therefore adopt some religious dogma as a standard for action.

The official sanction of any religious doctrine and its enforcement by government authority is patently a breach of the 'wall between Churēh and State.' *Cantwell v. Connecticut*, 310 U. S. 296, 305.

The Miracle was banned because, it was thought to be a "visual caricature of religious beliefs held sacred" (Exhibit A, p. 12). Caricature is but an expression of disapproval or disagreement. The Constitutional guaranty of the free exercise of religion extends to the profession of religious belief. *Cantwell v. Connecticut*, 310 U.S. 296; *People ex rel McCollum v. Board of Education*, 333 U.S. 233, 210. The freedom to express disbelief is not limited to any particular form or method or medium. Nor may any expression of disbelief be suppressed because it offends the sensibilities, or insults the cherished doctrine, of any religious group. *Cantwell v. Connecticut*, 310 U.S. 296; *Murdock v. Pennsylvania*, 319 U.S. 105, 116; *Kunz v. New York*, 346 U.S. 290.

III. *The statutes impose an unconstitutional restraint on freedom of expression and communication.* Unquestionably, if talking pictures are a medium of communication within the protection of the First and Fourteenth Amendments, the statute under consideration is unconstitutional and void on its face. The statute provides for inspection and licensing of films before they can be publicly shown. It authorizes the censors to determine which films may and which may not be seen. Any statute which requires permission in advance to exercise the right to publish and invests in the licensor discretion to determine whether the right may or may not be exercised, violates the constitutional guarantees of freedom of the press. *Near v. Minnesota*, 283 U.S. 697, 713-716; *Grosjean v. American Press Co.*, 297 U. S. 233; *Loyell v. Griffin*, (1938) 303 U. S. 444, 451-452.

The court below, relying on *Mutual Film Corp. v. Indus-*

*trial Commission of Ohio*, 236 U. S. 230 (1915), held that as motion pictures are primarily entertainment, they are not a medium of communication within the protection of the First and Fourteenth Amendments. It will be noted that three of the seven judges of the court dissented from that view. Judge Desmond, in his concurring opinion, stated that, "Motion pictures are . . . not excluded from First Amendment coverage (*United States v. Paramount Pictures*, 334 U. S. 131, 136)." He found, however, that the sacrilege in *The Miracle* might "incite an immediate breach of the peace" and therefore could be constitutionally suppressed (Exhibit A, p. 19).<sup>4</sup> Possible incitement of disorder was not the basis for suppression of the film in this case and is not the basis for the censorship provided for by the statute. In addition, the film has been shown extensively in various parts of the United States (including Washington, D. C.), and at no time and in no place incited any breach of the peace.

There is, therefore, no warrant or justification for the suppression of *The Miracle* on the ground that its exhibition tended to incite an immediate breach of the peace. Nor can the statute be sustained on that ground for, under the statute as construed, the preservation of the peace is not the basis for official action. The statute involves the exhibition of films for profit. Admission must be paid for the privilege of viewing the film. As the opinions expressed in films are not imposed upon their audience, it is difficult to conceive how they may be suppressed on the ground of tendency to incite to disorder.

The *Mutual Film* case, as Judge Fuld remarked, should be relegated to the history shelf (Exhibit A, p. 33). Since the time it was rendered in 1915, its underlying reasoning has been held erroneous, and its authority has been so impaired that the case may no longer be considered controlling. The

United States Supreme Court recently indicated fundamental disagreement with the principle of the *Mutual Film* case, in its dictum in *United States v. Paramount Pictures*, 334 U. S. 131, 66, "We have no doubt that moving pictures like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment." See also *Kovacs v. Cooper*, 336 U. S. 77, 102.

The *Mutual Film* case held that motion picture films are not an instrument for the publication of ideas, because motion pictures were "a business pure and simple", and were intended primarily for entertainment. The Supreme Court has since held that neither reason justifies the denial of freedom of speech and press. In *Grosjean v. American Press* (1936), 297 U. S. 233, it rejected the proposition that the right of free speech should be denied corporate enterprises engaged in business for profit. See also *Thomas v. Collins*, 323 U. S. 516, 531. Since the *Mutual Film* case, *supra*, was decided, the Supreme Court also repudiated the idea that freedom of press may be denied publications intended primarily for entertainment. *Hannegan v. Esquire, Inc.*, 327 U. S. 146; *Winters v. New York*, 333 U. S. 507.

The court, in the *Mutual Film* case, concerned itself solely with the question of whether the statute violated the Ohio Constitution. It was not until 1925, ten years after the decision in the *Mutual Film* case, that the provisions of the First Amendment relating to free speech and press were held applicable to State Legislation. That doctrine was first enunciated in 1925 in *Gitlow v. New York*, 268 U.S. 652, cf. also *Near v. Minnesota*, 283 U.S. 697, 722, 723. The *Mutual Film* case, therefore, cannot be considered as authority for the proposition that motion pictures must be denied the protection of the First (and Fourteenth) Amendments of the United States Constitution.

To contend, as did the court below, that movies are still merely spectacles and not a form of communication,

is to ignore the very significant changes that have occurred in the past 36 years. When the *Mutual Film* case was decided in 1915, the moving picture industry was in its infancy. That was the day of the nickelodeon, when most pictures were still in single reels (Terry Ramsaye, *The Annals of the American Academy of Political & Social Science*, Nov., 1947, pp. 4, 5). Movies were then a trivial form of entertainment without significance. The profound influence of the movies on the mores and thinking of the civilized world at the present time is undeniable.

The contention that Petitioner-Appellant, having sought a license pursuant to the statutes, is estopped from denying their validity as a violation of the right of free press is without merit. If that contention were valid, then Petitioner's only means of testing the validity of the law in question (it having been on the statute books for some years) would have been to ignore its provisions and risk criminal prosecution. "One who is willing to obey a statute and invoke its provisions by applying thereunder for a license to do business is quite free, when his application is denied, to enjoin the operation of the statute on the ground that it may not constitutionally require any license at all." *Buck v. Kuykendall*, 267 U.S. 307, 316. See also *O'Brien v. Wheelock*, 184 U.S. 450, 489; *Union Pacific R.R. Co. v. Public Service Comm.*, 248 U.S. 67, 69; *Abie State Bank v. Bryan*, 282 U.S. 765, 776; *Bacardi Corp. v. Dome-nech*, 311 U.S. 150, 166.

IV. The importance of the question is too evident to warrant any lengthy discussion. The cinema is perhaps our most vigorous art form, and, to quote a U.S. Senate Resolution (152), one of "the most potent instruments of communication of ideas." It is intolerable that the millions of film goers in New York State should be deprived of the right to view films dealing with religion because the views

expressed in the film conflict with those of a minority of a religious group. If the standards applied by the censors in this case were applied to literature, a great number of the world's masterpieces would be suppressed. The book burning would include works of John Milton, Francis Bacon, Jeremy Bentham, Thomas Hobbes, John Locke, John Stuart Mill, Addison and Steele, Oliver Goldsmith, Immanuel Kant, Maimonides, Spinoza, Sterne, Swedenborg, Balzac, Bergson, Cato, Comte, Benedetto Croce, D'Annunzio, Daudet, Defoe, Descartes, Diderot, Dumas (father and son), Hugo, Grotius, Flaubert, De la Fontaine, Anatole France, Edward Gibbon, Voltaire, Heine, Hugo, David Huine, Maeterlinck, Montaigne, Montesquieu, Pascal, Racine, Renan, Rousseau, Stendahl, Zola, to mention but a very few of the classics proscribed by the Index Librorum Prohibitorum (1940) on the ground that they violate or profane sacred doctrine.\* The extent to which political progress would have been impeded, and literature, philosophy and jurisprudence would have been impoverished, had the proscription of those writings been effective, is fortunately merely a matter for speculation. The repression of motion pictures as media for the dissemination of ideas will be a real and immediate danger if the statutes permitting censorship of films on religious grounds are sustained.

WHEREFORE, it is respectfully submitted that the questions presented by this appeal are substantial and of public importance, and the appeal in the above entitled cause comes within the proper jurisdiction of this Court.

EPHRAIM S. LONDON  
*Attorney for Petitioner-Appellant*  
*Office & P. O. Address*  
*150 Broadway*  
*New York 38, N. Y.*

\* The writings banned under the General Index for the same reason are legion.

**EXHIBIT A****Opinion of Court of Appeals, Concurring Opinion and Dissenting Opinion**

FROESSEL, J.:

A license for the exhibition of a motion picture film entitled "The Miracle" together with two other films, described in their combination as a trilogy and called "Ways of Love," was issued to petitioner on November 30, 1950, by the motion picture division of the Department of Education of the State of New York, under the governing statute (Education Law, art. 3, part II). "The Miracle" was produced in Italy as "Il Miracolo," and English subtitles were later added. A prior license has been issued to the original owner of the distribution rights for exhibition, with Italian subtitles alone, but the film was never shown under that license.

The first public exhibition of "The Miracle" as part of the trilogy, "Ways of Love," was shown in New York City on December 12, 1950. It provided an immediate and substantial public controversy, and the Education Department was fairly flooded with protests against its exhibition. Others expressed a contrary view. In consequence thereof, the Board of Regents of the University of the State of New York (hereinafter called the Regents) proceeded promptly to review the action of its motion picture division. It appointed a subcommittee, and directed a hearing requiring petitioner to show cause why the licenses should not be rescinded and cancelled.

After viewing the film and giving petitioner an opportunity to be heard, its subcommittee reported that there was basis for the claim that the picture is sacrilegious, and recommended that the regents view the film. Petitioner declined to participate in the hearing other than to appear specially before the subcommittee for the purpose of challenging the jurisdiction of the Regents to cancel the licenses, but its sole stockholder, Joseph Burstyn, appeared as an individual and filed a brief.

Thereupon and on February 16, 1951, after reviewing the picture and the entire record, the Regents unanimously adopted a resolution rescinding and canceling the licenses upon their determination that "The Miracle" is sacrilegious, and not entitled to a license under the law. Thereafter petitioner instituted the present Article 78 proceeding to review that determination, and now urges that (1) the Regents were powerless to review the action of its motion picture division or to revoke the licenses; (2) the word "sacrilegious" does not provide a sufficiently definite standard for action; (3) the Regents exceeded their authority; (4) the statute is unconstitutional as in violation of the First and Fourteenth Amendments of the Constitution of the United States in that denial or revocation of a license on account of sacrilege interferes with religious liberty and breaches the wall between church and state; and (5) the statute is unconstitutional *in toto* as a prior restraint on the right of free speech guaranteed by the First and Fourteenth Amendments of the Federal Constitution. The Appellate Division unanimously confirmed the determination of the Regents.

*First:* The principal argument advanced by petitioner is directed toward the claim that the Regents have no power under the statute to rescind a license once issued by the motion picture division, unless upon a charge of fraud in the procurement thereof or subsequent misconduct by the licensee. Any other construction of the statute, it is said, would be inequitable to petitioner, which has spent money relying upon the license as issued. The Regents, on the other hand, contend that they were empowered under the Education Law and our State Constitution to make the determination here challenged.

This issue, then, is one primarily of statutory construction, turning upon the intention of the Legislature as found in the language of the statutes. It is resolved by the answer to the question: Did the Legislature intend that the granting of a license by a subordinate official of the State Education Department should be a determination final and irrevocable, binding on the head of his department, the courts and the public for all time? As we said in *Matter of*

*Equitable Trust Co. v. Hamilton* (226 N. Y. 241, 245), "That is, in every case a question dependent for its answer upon the scheme of the statute by which power is conferred."

In considering the statute pattern conferring the power, we should note the framework of fact and circumstance in which the statutes are to be examined, and particularly the nature of the problem with which we are dealing. Motion pictures, by their very nature, present a unique problem. They are primarily entertainment, rather than the expression of ideas, and are engaged in for profit (*Mutual Film Corp. v. Industrial Commission of Ohio*, two cases, 236 U. S. 230, 247; *Mutual Film Corp. v. Hodges*, 236 U. S. 248). They have universal appeal to literate and illiterate, young and old, of all classes. They may exercise influence for good, but their potentiality for evil, especially among the young, is boundless. As was said in *Pathé Exchange, Inc. v. Cobb* (202 App. Div. 450, 457, affd. 235 N. Y. 539), where we sustained the original statute (L. 1921, ch. 715) creating the "motion picture commission," in respect to current events films: " \* \* \* many would cast discretion and self-control to the winds, without restraint, social or moral. There are those who would give unrestrained rein to passion. \* \* \* They appreciate the business advantage of depicting the evil and voluptuous thing with the poisonous charm." A public showing of an obscene, indecent, immoral or sacrilegious film may do incalculable harm, and the State, in making provision against the threat of such harm (Education Law, sec. 122), may afford protection as broad as the danger presented.

We are thus concerned with a valid exercise of the police power (*Mutual Film* cases, *supra*; annotation 64 A. L. R. 505, and cases therein cited; *Pathé Exchange, Inc., v. Cobb*, *supra*, and with rights acquired by licensees thereunder. Such rights are not contractual in the constitutional sense (*People ex. rel. Lodes v. Dept. of Health, etc.*, 189 N. Y. 187; 12 Am. Jur., Constitutional Law, sec. 405; 33 Am. Jur., Licenses, secs. 21, 65). This is the general rule notwithstanding the expenditure of money by a licensee in reliance upon the license, although there is authority to the contrary in the case of building permits (33 Am. Jur.,

Licenses, sec. 21; People ex rel. *Lodes v. Department of Health, etc., supra*, distinguishing at p. 196, *City of Buffalo v. Chadeayne*, 134 N. Y. 163). Moreover, rights gained under the statute are accepted with whatever conditions or reservations the statute may attach to them. With these precepts in mind, and in the light of the problem with which the Legislature dealt, we may properly turn to a consideration of the statutory scheme.

The original body for the licensing of motion pictures for exhibition in this State was an independent commission created by chapter 715 of the Laws of 1921, its members appointed by the Governor, by and with the advice and consent of the Senate. While the provisions for licensing were similar to those now in the Education Law, there was an essential difference in the scheme embodied therein due to the *independent* nature of the former commission, which was then expressly given all of the powers now granted to the Regents. In 1926, the functions of the motion picture commission were transferred to the Department of Education and the old commission was abolished (L. 1926, ch. 544; State Departments Law, sec. 312). In 1927, the present form of the statute was incorporated into the Education Law as article 43 thereof (L. 1927; ch. 153, secs. 28, 29). These changes were significant as will presently more fully appear.

The Regents are a constitutional body, existing since 1784 (N. Y. Const., art. XI, sec. 2). They are named as head of the education department in the same paragraph as are the three chief elective officers of the State, the Governor, Comptroller and Attorney-General (art. V, sec. 4). The latter provision of our Constitution empowers the Regents to "appoint and at their pleasure remove a commissioner of education to be the chief administrative officer of the department." The mere placing of the motion picture commission in the department of education indicates an intention that the Regents should henceforth exercise complete authority over that agency.

Moreover, by explicit language, the Legislature gave to the Regents as head of the education department all of the broad powers of control and supervision formerly pos-

sessed by the independent commission, leaving to the motion picture division only "the administrative work" of licensing (Education Law, secs. 101, 103, 132). Thus, by section 101, of the Education Law, the education department "is charged" with "the exercise of all the functions" of the department, and with "the performance of all" the "powers and duties" transferred from the former independent motion picture division, "whether in terms vested in such department" or in any "*division*" thereof. (Emphasis supplied.) And such performance is authorized "by or through" the appropriate officer or division; by the same section the Regents are continued as "the head of the department," as prescribed in the Constitution. The Regents appoint the director, officers and employees of the motion picture division, fix their compensation, assign duties to the division, establish local offices, and "prescribes the powers and duties" (Education Law, secs. 120, 121). The "form, manner and substance" of license applications are prescribed by the education department, and not by the motion picture division (Education Law, sec. 127).

The Regents must review the *denial* of a license before an unsuccessful applicant, who is given a "right of review by the regents," can avail himself of an article 78 proceeding (Education Law, sec. 124). A corresponding right of review where a license was *issued* must be deemed implicit in the broad powers of the board, rendering needless any additional language by way of express grant; when the Legislature intends to withhold the power of review from the head of a department with respect to the finding of an agency of the department, it does so by express language (Labor Law; Labor Relations, sec. 702, subd. 9; Workmen's Compensation Law, sec. 142, subd. 4). Finally, the Regents "have authority to enforce the *provisions and purposes*" of the statute and to make rules and regulations in "carrying out the enforcing (its) *purposes*" (Education Law, sec. 132; emphasis supplied). This latter provision is taken directly from the original statute (sec. 15); and, although not embraced in the 1926 enactment transferring functions of the independent motion picture commission, this precise authority was expressly given to the Regents by the 1927

amendment (former sec. 1092 of the Education Law). The power to enforce embraces the power to correct the action of a subordinate, and one of the specific provisions and purposes of the act is that no sacrilegious films be licensed.

From all of this it is clear that the motion picture division is subject and subordinate to the education department and the Regents, and is not independent thereof (*cf. Butterworth v. United States*, 112 U. S. 50, in which an altogether different statute pattern was involved, and where an appeal was expressly authorized from the commissioner to the court, either directly or by means of an original suit in equity). Even such functions as may now be exercised by the director of the division under the statute may be exercised by other officials upon authorization by the Regents (Education Law, secs. 120, 122). Without question, then, the statute constitutes the Regents the main-spring of the entire system therein set up. To deny them the power to correct the action of a subordinate, when the ultimate responsibility rests upon them, would be to set at naught the whole elaborate plan established by the Legislature. Such power is "essential to the exercise" of the powers expressly granted (*Lawrence Constr. Corp. v. State of New York*, 293 N. Y. 634, 639).

If petitioner's interpretation of the Education Law were to be adopted, no review either of an administrative or supervisory nature, or through the civil or criminal courts (see Penal Law, sec. 1141, as amended by L. 1950, ch. 624; *Hughes Tool Co. v. Fielding*, 188 Misc. 942, affd. 272 App. Div. 1048, affd. 297 N. Y. 1024), of the action of a subordinate granting a license in the first instance as provided by the Legislature. Thus, the most indecent, obscene, immoral, sacrilegious or depraved presentation might be made through the medium of motion picture film, provided only there was some slip, inadvertence or mistake on the part of the reviewer, leaving his superiors, the courts, and the public generally powerless to correct the situation. It would simply mean that this statutory plan to protect the public from films forbidden to be licensed for general exhibition under section 122 rests entirely upon the judgment of one or two persons in the motion picture division,

whose favorable determination in the first instance is irrevocably binding on the People of the State of New York. Such intention on the part of the Legislature would seem to be so utterly unreasonable and out of harmony with basic public policy in these matters as to be unthinkable (*People v. Ahearn*, 196 N. Y. 221, 227).

On the other hand, the only reasonable view to be taken is that the Legislature deemed the Constitution and the Education Law vested in the Regents as an independent constitutional body such supervisory powers as sufficiently to protect the public interest against improper action by subordinates, and that the authority thereby granted is therefore sufficiently complete in itself to accomplish the salutary purposes envisioned therein. Once the Legislature placed the power to license in the department of education, the Constitution (art. V, sec. 4) mandated the Board of Regents as its head to exercise it, and there is no legislation even purporting to restrict them from doing so. They are authorized to employ subordinates and to function "by or through them," but are not thereby divested of their own ultimate responsibility. The action of the motion picture division must thus be regarded as reviewable by the Regents in any case—where the license is refused, on demand of the applicant; where the license is granted, on the Regents' own motion.

Accordingly, we are of the opinion that the Regents have power to review the action of its motion picture division in granting a license to exhibit motion pictures, and rightfully exercised its jurisdiction in this case.

*Second:* To the claim that the statute delegates legislative power without adequate standards, a short answer may be made. Section 122 of the Education Law provides that a license shall be issued for the exhibition of a submitted film, "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." Only the word "sacrilegious" is attacked for indefiniteness. The dictionary, however, furnishes a clear definition thereof, were it necessary to seek one, as, e. g., "the act of violating or profaning anything sacred" (Funk

& Wagnell's New Standard Dictionary, 1937). There is no difficulty in recognizing the limits of the criterion thus established, and the courts have had no problem either with the word "sacrilegious" or with its synonym, "profane."

In *Mutual Film Corp. v. Hedges* (236 U. S. 248, *supra*), the contention that there was an invalid delegation of legislative power was rejected where the statute provided that the censor should approve such films as were found to be "moral and proper, and disapprove such as are *sacrilegious*, obscene, indecent, or immoral, or such as tend to corrupt the morals" (emphasis supplied). In *Winters v. New York* (333 U. S. 507, 510) it is stated that publications are "subject to control if they are lewd, indecent, obscene or *profane*" (emphasis supplied). In *Chaplinsky v. New Hampshire* (315 U. S. 568, 571-572) Mr. Justice Murphy declared for a unanimous court: "There are certain well-defined and narrowly limited classes of speech, the *prevention* and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the *profane* \* \* \*" (emphasis supplied). Indeed, Congress itself has found in the word "profane" a useful standard for both administrative and criminal sanctions against those uttering profane language or meaning by means of radio (*Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153, 156, certiorari denied, 340 U. S. 929; U. S. Code, tit. 47, Annotated, sec. 303, m, D; U. S. Code, tit. 18, Annotated, sec. 1464; see, also, Penal Law, sec. 2072).

Accordingly, the claim that the word "sacrilegious" does not provide a sufficiently definite standard may be passed without further consideration, since it is without substance.

*Third:* We turn now to the contention that the Regents exceeded their powers.

Petitioner urges that, even if the board had the power, there was no justification for revocation. Of course, as the Appellate Division below, in its opinion, said: "Under the familiar rule, applicable to all administrative proceedings, we may not interfere unless the determination made was one that no reasonable mind could reach." This rule applies to the courts and not to administrative agencies, as

the Regents. (*Matter of Foy Productions, Ltd. v. Graves*, 253 App. Div. 475, affd. 278 N. Y. 498.)

We have all viewed the film in question. The so-called exhibits, which are simply unsworn communications expressing personal opinions, are of little help to us. The principal basis for the charge of sacrilege is found in the picture itself, the personalities involved, the use of scriptural passages as a background for the portrayal of the characters, and their actions, together with other portions of the script and the title of the film itself. It is featured as a "way of love." At the very outset, we are given this definition: "ardent affection, passionate attachment, men's adoration of God, sexual passion, gratification, devotion."

While the film in question is called "The Miracle," no miracle is shown; on the contrary, we have the picture of a demented peasant girl meeting a complete stranger whom she addresses as "Saint Joseph". At the very beginning of the script, reference is made to "Jesus, Joseph, Mary". "Saint Joseph" first causes her to become intoxicated. Scriptural passages referring to the Holy Sacrament (Luke 22:19), and to the nativity of Christ (Matt. 1:20), are freely employed immediately after she states she is not well. A blackout in the film, in its association with the story, compels the inference that sexual intercourse and conception ensue. "Saint Joseph" abandons her immediately following the seduction, she is later found pregnant, and a mock religious procession is staged in her honor; she is "crowned" with an old washbasin, is thrown out by her former lover, and the picture concludes with a realistic portrayal of her labor pains and the birth in a church courtyard of her child, whom she addresses as "my blessed son", "My holy son".

Christ is the heart and core of the Christian faith. Two personalities most closely related to Him in life were His mother, Mary, and Joseph. They are deeply revered by all Christians. Countless millions, over the centuries have regarded their relationship as sacred, and so do millions living today. "The Miracle" not only encroaches upon this sacred relationship and the Biblical presentation thereof in respect to the birth of Christ, but utterly destroys it, associ-

ating it, as the Regents found, "with drunkenness, seduction, mockery and lewdness", and, in the language of the script itself, "with passionate attachment, sexual passion and gratification", as a way of love.

In the light of the foregoing, we conclude, as did the Appellate Division, that we cannot say that the determination complained of "was one that no reasonable mind could reach"; and that the board did not act arbitrarily or capriciously.

*Fourth:* It is further urged that a license may not be denied or revoked on the ground of sacrilege, because that would require a religious judgment on the part of the censoring authority and thus constitute an interference in religious matters by the State. In this connection, it is also urged that freedom of religion is thereby denied, since one man's sacrilege is another man's dogma, and one may thus be prevented from propagating his own religious views by means of motion pictures. The latter argument is specious when applied to motion pictures offered to the public for general exhibition as a form of entertainment, as we shall hereafter point out. Religious presentations, as ordinarily understood, as well as other educational and scientific films, are exempt (Education Law, sec. 123). Thus freedom of religion is not impaired in the slightest, as anyone may express any religious or anti-religious sentiment he chooses through a proper use of the films.

Nor is it true that the Regents must form religious judgments in order to find that a film is sacrilegious. As hereinbefore indicated, there is nothing mysterious about the standard to be applied. It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule to the extent that it has been here, by those engaged in selling entertainment by way of motion pictures. As the court below said of the statute in question, "All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom."

Although it is claimed that the law benefits all religions and thus breaches the wall of separation between church

and state, the fact that some benefit may incidentally accrue to religion is immaterial from the constitutional point of view if the statute has for its purpose a legitimate objective within the scope of the police power of the State (*Everson v. Board of Education*, 330 U. S. 1; *Cochran v. Louisiana State Board*, 281 U. S. 370; *Bradfield v. Roberts*, 175 U. S. 291; *People v. Friedman*, 302 N. Y. 75, appeal dismissed for want of substantial Federal question, 341 U. S. 907). Cases such as *People ex rel. McCollum* (333 U. S. 203) and *Cantwell v. Connecticut* (310 U. S. 296) are not to the contrary. The former case dealt with the use of state property for religious purposes (*Zorach v. Clauson*, 302 N. Y. ), while the latter held (p. 305) that "a censorship of religion as the means of determining its right to survival is a denial of liberty protected by the" First and Fourteenth Amendments. Yet even in those cases it was recognized that the States may validly regulate the manner of expressing religious views if the regulation bears reasonable relation to the public welfare. Freedom to believe—or not to believe—is absolute; freedom to act is not. "Conduct remains subject to regulation for the protection of society" (*Cantwell v. Connecticut, supra*, at p. 304; *American Communications Assn. v. Douds*, 339 U. S. 382, 393).

The statute now before us is clearly directed to the promotion of the public welfare, morals, public peace and order. These are the traditionally recognized objects of the exercise of police power. For this reason, any incidental benefit conferred upon religion is not sufficient to render this statute unconstitutional. There is here no regulation of religion; nor restriction thereof or other interference with religious beliefs except insofar as the picture itself does so, nor is there any establishment of religion or preference of religion or use of state property or funds in aid of religion. There is nothing more than a denial of the claimed right to hurl insults at the deepest and sincerest religious beliefs of others through the medium of a commercial entertainment spectacle.

We are essentially a religious nation (*Church of the Holy Trinity v. United States*, 143 U. S. 457, 465), of which it is well to be reminded now and then, and in the *McCollum*

case (*supra*) the Supreme Court paused to note that a manifestation of governmental hostility to religion or religious teachings "would be at war with our national tradition" (at p. 211). The preamble to our State Constitution expresses our gratitude as a people to Almighty God for our freedom. To say that government may not intervene to protect religious beliefs from purely private or commercial attacks or persecution, whatever the underlying motive, and however skillfully accomplished, as distinguished from the assertion of conflicting beliefs, is to deny not only its power to keep the peace, but also the very right to "the free exercise" of religion, guaranteed by the First Amendment. The offering of public gratuitous insult to recognize religious beliefs by means of commercial motion pictures is not only offensive to decency and morals, but constitutes in itself an infringement of the freedom of others to worship and believe as they choose. Insult, mockery, contempt and ridicule can be a deadly form of persecution —often far more so than more direct forms of action. The prohibition of such conduct comes within the legitimate sphere of State action, and this State has recognized this principle, not only in the Education Law but in other respects as well (see, e. g., Penal Law, art. 186; Civil Rights Law, art. 4). We are not aware that this power has ever been even impliedly denied to the States.

This nation is a land of religious freedom; it would be strange indeed if our Constitution, intended to protect that freedom, were construed as an instrument to uphold those who publicly and sacrilegiously ridicule and lampoon the most sacred beliefs of any religious denomination to provide amusement and for commercial gain.

For the foregoing reasons, we conclude that the challenged portion of the statute in no way violates the provisions of the First Amendment relating to religious freedom.

*Fifth:* Petitioner finally argues that the statute is unconstitutional *in toto*; that motion pictures are to be treated as the press generally, and may not be subjected to censorship or prior restraint. While it may not be heard in this respect, inasmuch as it has sought and obtained benefits under the statute, and even now seeks to retain the licenses

granted (*Fahey v. Mallonee*, 332 U. S. 245, 255; *Shepherd v. Mount Vernon Trust Co.*, 269 N. Y. 234, 244-247), we shall dispose of this argument upon the merits.

The contention urged is made in the face of direct holdings to the contrary (*Mutual Film cases, supra*; *RD-DR Corp. v. Smith*, 183 F. 2d 562, cert. den. 340 U. S. 853; *Pathé Exchange, Inc. v. Cobb*, 202 App. Div. 450, affd. 236 N. Y. 539; 64 A. L. R. 505).

The rationale of these decisions is that motion pictures are primarily a form of entertainment, a spectacle or show, and not such vehicles of thought as to bring them within the press of the country. On this basis, petitioner's contention that the *Mutual* cases lack authority today, because it was not the Federal Constitution against which the statute was there tested, is unsound, for the Ohio Constitution guarantees free speech and a free-press as does the Federal Constitution. Essentially, what petitioner would have us do is to predict that the Supreme Court will overrule the *Mutual* cases and so disregard them here, as well as our own holding in the *Pathé* case. But such was the position squarely taken in the *RD-DR* case, where the same arguments were presented as are here urged, and they were unequivocally rejected.

On the same footing is the contention that technical developments have made a difference in the essential nature of motion pictures since the *Mutual* decisions. Such development was foreseen in the *Mutual* cases (see p. 242), and was realized at the time of the *RD-DR* case (p. 565), decided a year ago. We have already pointed out that scientific and educational films, among others of kindred nature, are not within the general licensing statute, and are thus not concerned with any problem that might be raised by an attempt to impose general censorship upon such films.

Some comfort is found by petitioner in a statement in *United States v. Paramount Pictures, Inc.* (334 U. S. 131, 166) to the effect that "moving pictures, like newspapers and radio, are included in the press". That was an anti-trust case, freedom of the press was not involved, and the statement was pure dictum. Moreover, it may be observed that when certiorari was sought in the *RD-DR* case, it was

denied by the same court; the only Justice voting to grant was the one who wrote that dictum. Were we to rely upon dictum, the concurring remarks of Mr. Justice Frankfurter in a subsequently decided free speech case (*Kovacs v. Cooper*, 336 U. S. 77, at p. 96), would be appropriate: "Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated." (Citing the *Mutual* cases.) However, dictum is ~~a~~ fragile bark in which to sail the constitutional seas.

The fact is that motion pictures do create problems not presented by other media of communication, visual or otherwise, as already indicated. It should be emphasized, however, that technical developments which increase the force of impact of motion pictures simply render the problem more acute. It does not avail to argue that there is now greater ability of transmission, when it is precisely that ability which multiplies the dangers already inherent in the particular form of expression.

Whether motion pictures are *sui generis* or a very special classification of the press becomes a question for the academicians, once it is recognized that there is a danger presented and met by legislation appropriate to protect the public safety, yet narrow enough as not otherwise to limit freedom of expression. If there is any one proposition for which the free speech cases may be cited from *Schenck v. United States* (249 U. S. 47) to *Dennis v. United States*, and *Breard v. Alexandria*, decided June 4, 1951, it is that freedom of speech is not absolute, but may be limited when the appropriate occasion arises. We are satisfied that the dangers present and foreseen at the time of the *Mutual Film* cases are just as real today.

The order of the Appellate Division should be affirmed, with costs.

**DESMOND, J. (concurring).** I concur for affirmance for these reasons: 1. It is not too clear from the statutes, that the Legislature, transferring (by L. 1926, ch. 544) motion picture licensing from an independent State Motion Picture Commission to a new motion picture division in the State Department of Education intended, without so saying, that

the Board of Regents, as head of the education department, should have power to revoke a license granted by the division. However, there is general language in the statute (Education Law, § 132) empowering the Regents to enforce the licensing law, including its prohibition against the licensing of "obscene, indecent, immoral, inhuman, sacrilegious" films (Education Law, § 122), and it would be an improbable legislative intent that would leave all this solely to a division of the department, with no corrective authority available elsewhere in the State government. It would be anomalous if the Regents, charged by the statute with enforcing the law, could not correct the errors of their subordinate body.

2. As to whether this film can be considered sacrilegious, our own jurisdiction is limited by the *Miller v. Kling* (291 N. Y. 65) rule which requires us to uphold the administrative body's decision if supported by substantial evidence. In other words, if reasonable men could regard the picture as sacrilegious, then we cannot say that the Regents' ruling is wrong as matter of law. Reasonable, earnest and religious men in great numbers have said so, although other earnest religious voices express the other view. There was thus fair basis for the Regents' holding.

3. "Sacrilegious", like "obscene" (see *Winters v. New York*, 333 U.S. 507), is sufficiently definite in meaning to set an enforceable standard. That men differ as to what is "sacrilegious" is beside the point—there is nothing in the world which all men everywhere agree is "obscene", yet obscenity laws are universally enforced. Of course, some of the meanings of "sacrilegious" have no possible application to a motion picture, but, according to all the dictionaries, and common English usage, the adjective has one applicable meaning, since it includes violating or profaning anything held sacred (see 8 Oxford Dictionary, pp. 18-19; Webster's New Int. Dictionary [2d ed.], unabridged, p. 2195; Black's Law Dictionary, [de luxe ed.], p. 1574). We thus have a statutory term of broad but ascertainable meaning, and, by settled law, the administrative application thereof must be accepted by the courts "if it has 'warrant in the record' and a reasonable basis in law." (*Matter of*

*Mounting & Finishing Co. v. McGoldrick*, 294 N. Y. 104, 108; *Red Hook Cold Storage Co. v. Dept. of Labor*, 295 N. Y. 1, 9.

4. Motion pictures are, it would seem, not excluded from First Amendment coverage (*United States v. Paramount Pictures*, 334 U.S. 131, 166) but, since there was a reasonable ground for holding this film "sacrilegious" (in the meaning which the Legislature must have intended for that term), the film was constitutionally "subject to control" (*Ex parte Jackson*, 96 U.S. 727, 736, cited in *Winter v. New York, supra*). It fell within the "well-defined and narrowly limited classes of speech, the *prevention* and punishment of which have never been thought to raise any Constitutional problem" (*Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 572—italics mine). The *Chaplinsky* decision says that these narrowly limited classes of constitutionally preventible utterances include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." That covers this case, and should dispose of any claim of violation of the First Amendment. If not, then any prior censorship at all of any motion picture is unconstitutional, and the floodgates are open.

FULD, J. (dissenting). It may lend perspective to recall that we are here concerned with a motion picture that has passed the rigid scrutiny of a numerous array of critics of undenied religiousness. There is, of course, no suggestion that "The Miracle" is a product of heathen lands. The story was written by a Roman Catholic and the picture produced, directed and acted solely by Roman Catholics. It was filmed in Italy, and first exhibited in Rome, where religious censorship exists. There, the Vatican newspaper, *L'Osservatore Romano*, weighed its artistry without registering the slightest doubt as to its piety. Then it passed the United States Customs with no voice raised against it.

In 1949 and again in 1950, successive directors of the motion picture division of the State Education Department licensed the film for statewide exhibition. It won the approval of the National Board of Review of Motion Pic-

tures. It drew general acclaim from the press and was designated, as part of a trilogy, the best foreign language film of 1950 by the New York Film Critics, an association of critics of the major metropolitan newspapers. Finally, one important Roman Catholic publication, after deplored "these highly arbitrary invocations of a police censorship," noted that the film "is not obviously blasphemous or obscene, either in its intention or execution" (*The Commonwealth*, March 16, 1951, pp. 567-568; also, March 2, 1951, pp. 507-508), and all Protestant clergymen who expressed themselves publicly—and they constituted a large number representing various sects—found nothing in the film either irreverent or irreligious.

However, as Judge FROESSEL reminds us, the contrary opinion also found strong voice, eventually reaching the ears of the board of regents. After viewing the film, that body revoked and rescinded the license—some two years after it had been granted—invoking as authority therefore section 122 of the Education Law. That statute provides that the motion picture division shall license each moving picture submitted to it unless it is "obscene, indecent, immoral, inhuman or sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." The board of regents decided that the film is "sacrilegious," and its decision was confirmed by the Appellate Division.

Laying to one side for the moment the question as to the constitutionality of a statute which sanctions the banning of a moving picture on the ground that it is "sacrilegious," I am of opinion that the regents' action was without legislative warrant.

The controlling statute, the Education Law, is significant both for what it says and for what it leaves unsaid. In section 124, entitled "Review by Regents," the legislature expressly gave the regents power to review a determination of the motion picture division *denying* a license—but it conferred no similar power to review the division's *granting* of a license. By settled rules of construction, that deliberate omission by the legislature clearly indicates that no such authority was intended (see e.g., Sutherland, *Statutes*

*and Statutory Construction* [3d ed. 1943] §§4915-4917). And the more one searches the statute, the more clearly does that appear. For example, the statute expressly authorizes the regents to revoke a permit issued for the exhibition of a scientific or educational film (§125) and to revoke a motion picture license if it was obtained on a false application or if the licensee tampered with the film or if there is a "conviction for a crime committed by the [film's] exhibition or unlawful possession" (§ 128). But nowhere in the statute is there to be found any general grant of power to the regents to revoke a previously issued license. This omission is also to be contrasted with the further and explicit grant of such a power or revocation by the same Education Law as regards many other types of licenses issued by the Education Department (See, e.g., §6514 [as to doctors]; §6613 [as to dentists]; §6712 [as to veterinarians]; §6804 [as to pharmacists]; §7108 [as to optometrists]; §7210 [as to engineers]; §7308 [as to architects]; §7406 [as to certified public accountants]; §7503 [as to shorthand reporters].) Clearly, the legislature knew how to bestow the power of revocation when that was its purpose.

Even more recent evidence of the legislature's design is at hand. In 1950, the legislature amended the Penal Law to prohibit prosecution, on the ground of obscenity, of a film licensed under the Education Law (Laws 1950, ch. 624, amending Penal Law, §1141). That enactment was inspired by *Hughes Tool Co. v. Fielding* (297 N.Y. 1024, affg. 272 App. Div., 1048, affg. 188 Misc. 947). It has therefore been held that such a criminal prosecution was permissible because the Education Law neither provided for nor allowed any direct review by the regents or the courts of a decision of the motion picture division issuing a license. If the legislature had disagreed with that interpretation of the Education Law—clearly indicated at Special Term (188 Misc., at p. 952)—it would undoubtedly have amended the Education Law, not the Penal Law. By depriving the state of the power to prosecute the exhibition of a film once it receives a license, the legislature affirmed, as clearly as it could, that the granting of a license is an act of such im-

placable finality that it may not be challenged collaterally in a criminal prosecution any more than directly in a civil proceeding.

The legislative scheme so clearly expressed, the board of regents may neither rely upon its status as head of the Education Department to reverse decisions of a subordinate which are not the result of illegality, fraud or vital irregularity (see, e.g., *Butterworth v. Hoe*, 112 U.S. 50, 56, 64; cf *People ex rel. Finnegan v. McBride*, 226 N.Y. 252, 257; *People ex rel. Chase v. Wemple*, 144 N.Y. 478, 482; *Matter of D. and D. Realty Corp. v. Coster*, 277 App. Div. 668)<sup>1</sup>) nor draw from section 132 of the Education Law—which in overall manner gives the board “authority to enforce the provisions and purposes of part two of this article”—an assumption of authority to “review” and revoke the grant of a license by the motion picture division. All that section 132 was designed to do, and all that it does, is to authorize enforcement. To construe its general language as authorizing review of the granting of a license is to stretch language beyond all permissible limits and to render superfluous and meaningless the very explicit language of section 124 permitting such review only where a license has been denied.

“A statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration. A power not expressly granted by statute is implied only where it is ‘so essential to the exercise of some power expressly conferred as plainly to appear to have been within the intention of the legislature. The implied power must be necessary, not merely convenient, and the intention of the legislature must be free from doubt.’ (*People ex rel. City of Olean v. W.N.Y. & P.T. Co.*,

---

<sup>1</sup> There is no substance to the regents’ claim that they were merely correcting the “illegal” action of the motion picture division in licensing a “sacrilegious” picture. Since obviously there was at least reasonable doubt as to whether the film was “sacrilegious”, the decision of the motion picture division could not be condemned as “illegal.”

214 N.Y. 526, 529). *Lawrence Constr. Corp. v. State of New York*, 293 N.Y. 634, 639).

So, here, the regents' contention that they *must* have power to review and revoke in order to guard against error by the motion picture division in granting licenses, is not persuasive. The fact is that, in the twenty-five years during which the motion picture division has been in the Department of Education, the regents have never before reviewed the grant of a license or even suggested the existence of such a power. Limited as we are to a determination of what the legislature has done, the argument of alleged necessity has no weight in the face of this long-continued practical construction. For this court now to read into the statute a provision which that body chose not to write into it would constitute an uncalled-for intrusion into the sphere of the legislature.

Even if I were to assume, however, that the statute does confer a power to review and revoke, I would still conclude for reversal: In my view, that portion of the statute here involved must fall before the constitutional guarantee that there be freedom of speech and press. The early decision of *Mutual Film Corp. v. Ohio Indus'l Comm.*, 236 U.S. 230, is urged as conclusively establishing that motion pictures are not within the First Amendment's coverage or protection. The consistent course of decision by the Supreme Court of the United States in recent years, however, persuades me that that early decision no longer has the force or authority here claimed for it.

We are confronted in this case with censorship in its baldest form—a licensing system requiring permission in advance for the exercise of the right to disseminate ideas via motion pictures, and committing to the licensor a broad discretion to decide whether that right may be exercised. Insofar as the statute permits the state to censor a moving picture labelled "sacrilegious," it offends against the First and Fourteenth Amendments of the Federal Constitution, since it imposes a prior restraint—and, at that, a prior restraint of broad and un-defined limits—on freedom of discussion of religious matters. And, beyond that, it may well be that the restraint on the "sacrilegious" constitutes

an attempt to legislate orthodoxy in matters of religious belief, contrary to the First Amendment's prohibition against laws "respecting an establishment of religion." (Cf. *Everson v. Board of Education*, 330 U.S. 1, 15; *Illinois ex rel. McCollom v. Board of Education*, 333 U.S. 203, 210).

The freedoms of the First Amendment are not, I appreciate, absolute, although they are as near to absolutes as our judicial and political system recognizes. But, insofar as these freedoms are qualified, the qualification springs from the necessity of accommodating them to some equally pressing public need. Thus, some limited measure of restraint upon freedom of expression may be justified where the forum is the public street or the public square, where the audience may be a "captive" one, and where breaches of the peace may be imminent as the result of the use, or rather the abuse, of fighting words (Cf. *Dennis v. United States*, 341 U.S. 494, 503, et seq.; *Feiner v. New York*, 340 U.S. 315, 319; *Niemotko v. Maryland*, 340 U.S. 268; *Terminiello v. Chicago*, 337 U.S. 1; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572; *Cantwell v. Connecticut*, 310 U.S. 296, 308; *Schneider v. State*, 308 U.S. 147, 160). Here, there is no "captive" audience; only those see the picture who wish to do so, and, then, only if they are willing to pay the price of admission to the theatre. Moreover, if subject matter furnishes any criterion for the exercise of a restraint, I know of no subject less proper for censorship by the state than the one here involved.

The Supreme Court has "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places" (*Kunz v. New York*, 340 U.S. 290, 294; see, also, *Niemotko v. Maryland*, *supra*; 340 U.S. 268; *Saia v. New York*, 334 U.S. 558; *Cantwell v. Connecticut*, *supra*, 310 U.S. 296; *Hague v. C.I.O.*, 307 U.S. 496; *Lovell v. Griffin*, 303 U.S. 444). "The State cannot of course forbid public proselytizing or religious argument merely because public officials disapprove the speaker's views. It must act in patent good faith to maintain the public peace, to assure the availability of the streets for their primary purposes of passenger and ve-

hicular traffic, or for equally indispensable ends of modern community life" (see *Niemotko v. Maryland, supra*, 340 U.S. 268, 282, per FRANKFURTER, J., concurring).

Invasion of the right of free expression must, in short, find justification in some overriding public interest, and the restricting statute must be narrowly drawn to meet an evil which the state has a substantial interest in correcting. (See *Feiner v. New York, supra*, 340 U.S. 315, 319; *Niemotko v. Maryland, supra*, 340 U.S. 268; *Winters v. New York*, 333 U.S. 507, 509; *Cantwell v. Connecticut, supra*, 310 U.S. 296, 307-308; *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 105). The statute before us is not one narrowly drawn to meet such a need as that of preserving the public peace or regulating public places. On the contrary, it imposes a general and pervasive restraint on freedom of discussion of religious themes in moving pictures, which cannot be justified on the basis of any substantial interest of the state (Cf. *Kunz v. New York, supra*, 340 U.S. 290; *Dennis v. United States, supra*, 341 U.S. 494, 508-509).

Over a century ago, the Supreme Court declared that "the law knows no heresy and is committed to the support of no dogma \* \* \*." (*Watson v. Jones*, 80 U.S. 679, 728). Just as clearly, it is beyond the competency of government to prescribe norms of religious conduct and belief. That follows inevitably from adherence to the principles of the First Amendment. "In the realm of religious faith, and in that of political belief," it has been said (*Cantwell v. Connecticut, supra*, 310 U.S. 296, 310), "sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

The inherent indefinability, in its present context, of the term "sacrilege" is apparent upon the merest inquiry.

At what point, it may be asked, does a search for the eternal verities, a questioning of particular religious dogma, take on the aspect of "sacrilege?" At what point does expression or portrayal of a doubt of some religious tenet become "sacrilegious"? Not even authorities or students in the field of religion will have a definitive answer, and certainly not the same answer. There are more than two hundred and fifty different religious sects in this country, with varying religious beliefs, dogmas and principles (See *Illinois ex rel. McCollum v. Board of Education, supra*, 333 U.S. 203, 227, per FRANKFURTER, J., concurring). With this great contrariety of religious views, it has been aptly observed that one man's heresy is another's orthodoxy, one's "sacrilegè," another's consecrated belief. How and where draw the line between permissible theological disputation and "sacrilege?" What is orthodox, what sacrilegious? whose orthodoxy, to whom religious? In the very nature of things, what is "sacrilegious," will of necessity differ with the philosophy, the training, the education and the background of the particular censor of the moment, the determination whether a film is "sacrilegious" or not, must necessarily rest in the undiscoverable recesses of the official's mind.

Any possible doubt that the term is essentially vague is dispelled by a reference to the variant and inconsistent definitions ascribed to it by the board of regents and by the Appellate Division and Judge FROSSEL.

Thus, the regents, frowning upon the dictionary definition as "technical,"<sup>2</sup> nevertheless assure us that "everyone knows what is meant by this term" and, by way of demonstrating that fact, proceed to define the word as describing a film which "affronts a large segment of the population"; offends the sensibilities by ridiculing and burlesquing anything "held sacred by the adherents of a particular religious faith"; is "offensive to the religious sensibilities

<sup>2</sup>A typical definition of "sacrilege" is that found in Webster's New International Dictionary [2d ed., 1948]: "the crime of stealing, misusing, violating or desecrating that which is sacred, or holy, or dedicated to sacred uses." (See, also, the New Catholic Dictionary [Vatican ed., 1929]).

of any element of society." Indeed, any semblance of either general meaning or specific content is, I suggest, abandoned by the regents themselves when they assert that, since "anything is only sacrilegious to those persons who hold the concept sacred" the opinions of non-believers are "worthless." By such reasoning, the adherents of a particular dogma become the only judges as to whether that dogma has been offended! And, if that is so, it is impossible to fathom how any governmental agency such as the board of regents, composed as it is of laymen of different faiths, could possibly discharge the function of determining whether a particular film is "sacrilegious."

Judge FROESSEL and the Appellate Division state that the statutory proscription against the "sacrilegious" is intended to bar any "visual caricature of religious beliefs held sacred by one sect or another" (opinion of FROESSEL, J., p. 12). Though Judge FROESSEL also defines "sacrilegious" in terms of "attacking" or "insulting" religious beliefs or treating them with "contempt, mockery, scorn and ridicule"—all words of ephemeral and indefinite content—the basic criterion appears to be whether the film treats a religious theme in such a manner as to offend the religious beliefs of any group of persons. If the film does have that effect, and it is "offered as a form of entertainment," it apparently falls within the statutory ban regardless of the sincerity and good faith of the producer of the film, no matter how temperate the treatment of the theme, and no matter how unlikely a public disturbance or breach of the peace.

The drastic nature of such a ban is highlighted by the fact that the film in question makes no direct attack on, or criticism of, any religious dogma or principle, and it is not claimed to be obscene, scurrilous, intemperate or abusive. Nor is there any evidence of any malicious purpose or intention on the part of the producers of the film to revile or even attack Catholic doctrine or dogma, nor any suggestion of any reasonable likelihood of a breach of the peace resulting from the film's exhibition. So broad, indeed, is the suggested criterion of "sacrilege" that it might be applied to any fair and temperate treatment of a psycho-

logical, ethical, moral or social theme with religious overtones which some group or other might find offensive to its "religious beliefs."

It is claimed that "the courts have had no problem either with the word 'sacrilegious' or with its synonym, 'profane'" (Opinion of FROESSEL, J., *supra*, p. 9). The cases to which reference is made, however, involved neither the "profane" in religion nor the "sacrilegious," and the simple fact is that the Supreme Court has never had occasion to pass upon either the one term or the other. The context in which the word "profane" appears in the cases cited (*Winters v. New York, supra*, 333 U.S. 507, 510; *Chaplinsky v. New Hampshire, supra*, 315 U.S. 568, 572), as well as the authorities there relied upon (*Cantwell v. Connecticut, supra*, 310 U.S. 296, 309-310; *Chafee, Free Speech in the United States* [1941] pp. 149-150), make it evident that the term was used, not as a synonym for "sacrilegious," but as a substitute for "epithets or personal abuse," for swear words and for the other "insulting or 'fighting' words," which "by their very utterance inflict injury or tend to incite an immediate breach of the peace" and "are no essential part of any exposition of ideas" (*Chaplinsky v. New Hampshire, supra*, 315 U.S. 568, 572; see, also, *Cantwell v. Connecticut, supra*, 310 U.S. 296, 310; *Chafee, op cit.*, p. 150). In short, the cases cited have nothing whatsoever to do with the "profane" in religion, and the judges who sat in them were not called upon to give the slightest thought or consideration to the subject with which we are now concerned.

The shortcomings of ambiguous epithets as rigid boundaries for free expression are great enough in temporal and political matters (cf. e.g., *Winters v. New York, supra*, 333 U.S. 507; *Dennis v. United States, supra*, 341 U.S. 494; *Jordan v. De George*, 341 U.S. 223; *Musser v. Utah*, 333 U.S. 95), but they are all the greater when the epithets trench upon areas of religious belief (see, e.g., *Kuñz v. New York, supra*, 340 U.S. 290; *Saia v. New York, supra*, 334 U.S. 558, 567; *Cantwell v. Connecticut, supra*, 310 U.S. 296). Indeed, the Supreme Court has gone so far as to hold that the First Amendment's guarantee forbids prior restraint of public discussion that even "ridicules" or "denounces" any form

of religious belief. (See *Kunz v. New York*, *supra*, 340 U.S. 290, and see, particularly, concurring opinion of FRANKFURTER, J., reported in 340 U.S. at pp. 285, 286). In a free society "all sects and factions, as the price of their own freedom to preach their views, must suffer that freedom in others." (*Kunz v. New York*, *supra*, 340 U.S. at p. 301, per JACKSON, J., dissenting; see also, *Murdock v. Pennsylvania*, 319 U.S. 105, 116).

Were we dealing with speeches, with handbills, with newspapers or with books, there could be no doubt as to the unconstitutionality of that portion of the statute here under consideration. The constitutional guarantee of freedom of expression, however, is neither limited to the oral word uttered in the street or the public hall nor restricted to the written phrase printed in newspaper or book. It protects the transmission of ideas and beliefs, whether popular or not, whether orthodox or not. A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed by the "air-borne voice," the printed word or the "still" picture, it is put forward by a "moving" picture. The First Amendment does not ask whether the medium is visual, acoustic, electronic or some yet unheard-of device. It has readily accommodated itself to other products of inventive genius, to other advances in technology, such as the radio and television. If "The Constitution deals with substance, not shadows," if "Its inlibation was levelled at the thing, not the name" (*Cummings v. Missouri*, 4 Wall. 277, 325), then surely, its meaning and vitality are not to be conditioned upon the mechanism involved. Of course, it may well be that differences in medium will give rise to different problems of accommodation of conflicting interests (See *Kovacs v. Cooper*, 336 U.S. 77, 96, per FRANKFURTER, J., concurring). But any such accommodation must necessarily be made in the light of fundamental constitutional safeguards.<sup>3</sup>

<sup>3</sup> Whether, for instance, the state (Education Law, §122) may be sustained as valid even as a censorship measure insofar as its criterion is the narrow one of "obscenity," is not of course, before us and need not be considered (Cf. *Chaplinsky v. New Hampshire*, *supra*; 315 U.S. 568, 572; *Near v. Minnesota*, 283 U.S. 607; *Ex parte Jackson*, 66 U.S. 727, 736).

One reason for denying free expression to motion pictures, we are told, is that the movies are commercial. But newspapers, magazines and books are likewise commercially motivated, and that has never been an obstacle to their full protection under the First Amendment (See, e.g., *Grosjean v. American Press Co.*, 297 U.S. 233). Again, it is said, the fact that the moving picture conveys its thought or message in dramatic episodes or by means of a story or in a form that is entertaining, makes the difference. But neither novels, magazines nor comic books are made censorable because they are designed for entertainment or amusement. (See, e.g., *Winters v. New York*, *supra*, 333 U. S. 507, 510; *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 153). The Supreme Court made that plain in the *Winters* case, when it declared: "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." (333 U.S. at p. 510).

Whatever may have been true thirty-six years ago when the *Mutual Film case*, *supra*, 236 U. S. 230, was decided, there is no reason today for casting the motion picture beyond the barriers of protected expression. Learned and thoughtful writers so opine (see Chafee, *Free Speech in the United States* [1942], pp. 544 et seq.; Ernst, *The First Freedom*, p. 268; Kupferman & O'Brien, *Motion Picture Censorship*, 36 Cornell Law Quart. 273; Note, 60 Yale Law Journ. 696; Note, 49 Yale Journ. 87), and the Supreme Court itself has recently so declared (See *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 166; see, also, *Kovacs v. Cooper*, *supra*; 336 U. S. 77, 102, per Black, J., dissenting). As Chafee put it (op. cit., p. 545), "In an age when 'commerce' in the Constitution has been construed to include airplanes and electromagnetic waves, 'freedom of speech' in the First Amendment and 'liberty' in the Fourteenth should be similarly applied to new media for the

communication of ideas and facts. Freedom of speech should not be limited to the air-borne voice, the pen, and the printing press, any more than interstate commerce is limited to stagecoaches and sailing vessels." And, wrote the Supreme Court (*United States v. Paramount Pictures, Inc.*, *supra*, 334 U. S. 131, 166), "We have no doubt that moving pictures, like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment."

Every consideration points that conclusion. The *Mutual Film* case should be relegated to its place upon the history shelf. Rendered in a day before the guarantees of the Bill of Rights were held to apply to the states, and when moving pictures were in their infancy, the decision was obviously a product of the view that motion pictures did not express or convey opinions or ideas. Today, so far have times and the films changed, some would deny protection for the opposite reason, for the reason that films are too effective in their presentation of ideas and points of view. The latter motion is as unsupportable as the other and antiquated view; that the moving picture is a most effective mass medium for spreading ideas is, of course, no reason for refusing it protection. If only ineffectual expression is shielded by the Constitution, free speech becomes a fanciful myth. Few would dispute the anomaly of a doctrine that protects as freedom of expression comic books that purvey stories and pictures of "bloodshed and lust" (see *Winters v. New York*, *supra*, 333 U. S. 507, 510), light and raey magazine reading (see *Hannegan v. Esquire, Inc.*, *supra*, 327 U. S. 146, 153) and loudspeaker harangues (see *Saia v. New York*, *supra*, 334 U. S. 558), and yet denies that same protection to the moving picture.

Sincere people of unquestioned good faith may, as in this case, find a moving picture offensive to their religious sensibilities; but that cannot justify a statute which empowers licensing officials to censor the free expression of ideas or beliefs in the field of religion. "If there is any fixed star in our constitutional constellation," the Supreme Court has said (*Board of Education v. Barnette*, 319 U. S. 624, 642), "it is that no official, high or petty, can prescribe what shall

be orthodox in politics, nationalism, religion or other matters of opinion . . . .

The order of the Appellate Division should be reversed and the determination of the board of regents annulled.

**LOUGHREN**, Ch. J., **LEWIS** and **CONWAY**, JJ., concur with **FROESSEL**, J.; **DESMOND**, J., concurs in separate opinion; **FULD**, J., dissents in opinion in which **DYE**, J., concurs.

Order affirmed.

---

### **EXHIBIT B**

#### **Opinion of Appellate Division**

**POSTER**, P. J.:

This is a proceeding under Article 78 of the Civil Practice Act to review a determination of the Board of Regents of the University of the State of New York which rescinded licenses for the public exhibition of a motion picture film, entitled "The Miracle," on the ground it is sacrilegious.

The picture, produced in Italy, depicts a demented peasant girl tending a herd of goats on a mountainside. A bearded stranger appears, garbed in a dress reminiscent of Biblical times. She imagines him to be St. Joseph, and that he has come to take her to heaven. While she babbles about this he says nothing, but plies her with wine, and the implication is left that he seduces her. Later, when her pregnancy becomes known to the villagers, they mock her and place a basin on her head in imitation of a halo. She exclaims at one point as to her pregnancy, "It's the grace of God." She leaves the village to take refuge in a cave, and finally gives birth to a child in the basement of a church which stands on a high hill.

According to the English dialogue, in her babbling to the bearded stranger, she makes these statements: "I'm not well . . . . And taking a loaf of bread, he broke it . . . . And an Angel of the Lord appeared in his dream and said . . . . Joseph, . . . . Son of David . . . . Have no fear to take Mary as your bride . . . . for what has been

conceived here \* \* \* St. Joseph \* \* \* Cast aside my body and my soul \* \* \* I'd feel so happy without this weight \* \* \* St. Joseph has come to me \* \* \* What Heaven \* \* Heaven on earth. \* \* \* The mad woman has received grace."

On March 2, 1949, the motion picture division of the State Education Department issued a license for the picture with Italian dialogue. Apparently it was never shown pursuant to this license. On November 30, 1950, it was again licensed as a part of a trilogy entitled "Ways of Love," with an English dialogue. After it had been publicly shown under this license the Board of Regents received many protests against its exhibition on the plaint that it was sacrilegious. A committee of the Regents was requested to view the picture, and after it had reported there was a basis for the claim that the picture was sacrilegious the Commissioner of Education issued an order requiring the licensees of the film to show cause at a hearing before the same committee why the licenses should not be revoked.

At the hearing before the committee, petitioner, who was the holder of the license last issued, appeared specially and challenged the Regent's authority to proceed in the matter on the theory that it had no power of review under the statute as to a license once issued. The committee reported that in its opinion the Regents had authority to consider whether the film was licensed illegally or not, and recommended that the Board of Regents, as a committee of the whole, view the picture. This action was taken, and after due consideration the Board found the picture to be sacrilegious, and voted to rescind the licenses therefor on February 16, 1951.

Overshadowing all other arguments petitioner contends on this review that censorship of sound motion pictures is unconstitutional as a previous restraint on freedom of speech and freedom of the press, in violation of the First and Fourteenth Amendments to the Constitution of the United States and to Section 8 of Article 1 of the Constitution of the state. We do not regard such an issue as an open one in this court. Motion pictures have been judicially declared to be entertainment spectacles, and not a part of

the press or organs of public opinion; and hence subject to state censorship (*Mutual Film Corporation v. Ohio Indemnity Co.*, 236 U. S. 230). This Court has upheld the power of the state to censor motion pictures (*Pathé Exchange, Inc., v. Cobb*, 202 App. Div. 450), a decision which was affirmed by the Court of Appeals (236 N. Y. 539). Strong criticism has been voiced against the distinctions made between movie-films and freedom of expression otherwise guaranteed (*Cornell Law Quarterly*, Vol. 36, No. 2, p. 273); and some dicta would seem to indicate a change of viewpoint (*United States v. Paramount Pictures*, 31 U. S. 136, 166). But despite the enlarged scope of motion pictures as a medium of expression in recent years, and the addition of sound dialogue, the latest authoritative judicial expression which bears directly on the subject still recognizes the distinction (*Rd-Dr Corporation, et al., v. Smith*, 183 Fed. Reporter [2nd series] 562; certiorari denied 340 U. S. 853). In view of this situation it is not appropriate for us, as an intermediate court, to re-examine the issue.

In addition to arguing against the principle of censorship generally, petitioner also argues that Section 122 of the Education Law, which bars the licensing of a motion picture deemed sacrilegious, is an unconstitutional exercise of legislative power. This argument proceeds on the theory that no thing can be deemed sacrilegious as applied to a motion picture without impinging on the constitutional guaranty of freedom of religion. Petitioner cites the fact that what may be sacrilegious to one group of citizens may not be so as to other groups; and hence it reasons that no enforceable meaning can be given to the term for the purpose of censorship. The Board of Regents based its revocation solely on the ground that the picture is sacrilegious; that it parodies in effect the Immaculate Conception and the Divine Birth of Christ as set forth in the New Testament. By millions of Christians these doctrines are held sacred, and any profanation thereof regarded as a sacrilege. Concededly there are other groups who do not accept these beliefs. May the state bar on the ground of sacrilege a motion picture that profanes the religious beliefs of one group, however large, when the profanation is not common

and universal to all groups? Assuming the validity of the distinction we have already noted between motion pictures and other organs of expression we think the answer to this question lies in the affirmative.

The term "sacrilege," according to modern semantics, means the violation or profanation of sacred things. It is derived from the Latin word "sacerlegium," which originally meant the theft of sacred things, but its meaning has since been widely extended. Even as far back as Cicero's time it had grown in popular speech to include any insult or injury to things deemed sacred, Encyclopaedia Britannica, Vol. 19, p. 803). Obviously the legislature used the term in its widest sense, and we think it was intended to apply to all recognized religions, not merely to one sect alone. Any construction which denoted a preference for one sect would be inconsistent with the constitutional mandate of complete separation between church and state. Support for this view may be found in another field. For instance, it is a criminal offense in this state to present an exhibition in which there shall be a living character representing the deity of any known religion (Penal Law, Section 2074). In a sense this statute also impinges on freedom of expression so far as religion is concerned, yet no one, that we can discover, has challenged the power of the state in the interests of public peace and order to enforce it. We think the state has the same power for the same reason to exercise a previous restraint as to motion pictures that may fairly be deemed sacrilegious to the adherents of any religious group. The exercise of such a power is directly related to public peace and order, and unless clearly in conflict with a constitutional prohibition it should not be denied.

We fail to see how such restraint can be construed as denying freedom of religion to anyone, or how it raises the dogma of any one group to a legal imperative above other groups. As we construe the statute all faiths are entitled to the same protection against sacrilege. This is not to say that full inquiry and free discussion, even to the point of attack, may not be had with regard to the doctrines of any religion, including Christianity, by those who are free-

thinkers and otherwise (*Commonwealth v. Kneeland*, 20 Pick. 206; *Cantwell v. Connecticut*, 310 U. S. 296). However motion pictures, staged for entertainment purposes alone, are not within the category of inquiry and discussion. A view of the picture in question would convince any reasonable mind that it was conceived and produced purely as an entertainment spectacle, and not as a vehicle for inquiry or discussion as to the merits of any religious dogma. The statute does not muzzle either free speech or a free press. All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom. It should be added in connection with this point that news films, scientific and educational films, are expressly exempted from censorship (Education Law, Section 123).

Aside from all this petitioner contends that the Board of Regents was without power to rescind a license granted by the motion picture division, because the statute does not expressly provide for a review by the Regents where a license is denied (Education Law, Section 124). The Regents take the view that in rescinding the licenses they were merely correcting the illegal acts of a subordinate body, and that as the head of the Department of Education and charged with the enforcement of censorship provisions of the statute they had the power to do so.

The motion picture division of the Department of Education is successor to the Motion Picture Commission, an independent body established in 1921 when the state first undertook the censorship of motion pictures. The latter was abolished in 1926 and its functions transferred to the Education Department (L. 1926, ch. 544). In 1927 the law was again revised and provided for the continuation of a motion picture division within the Education Department in language now contained in Section 120 of the present Education Law. This section provides in part:

"There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commis-

sioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees.

• • • •

Section 121 of the same statute authorizes the Regents to establish offices and bureaus for the reception and examination of films.

Section 122 provides for censorship in these words:

"The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, *sacrilegious*, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. \* \* \* \*  
(Italics supplied.)

Section 124 authorizes a review by the Regents, or a committee thereof, at the behest of an applicant in case a license is denied by the motion picture division.

Section 132, however, empowers the Board of Regents in the broadest of language to enforce the provisions and purposes of the entire article relating to the motion picture division.

These brief references to the statute clearly indicate that the motion picture division is a subordinate body of the Education Department under the control of the Board of Regents. We think it equally clear that the latter has the power to correct or rescind any illegal action taken by its motion picture division. If this is not so then the language of Section 132 of the statute must be held meaningless, for

one of the provisions and purposes of the statute is to prevent the licensing of a motion picture that is immoral or sacrilegious. If the motion picture division was an independent body, then undoubtedly the maxim cited by petitioner, "*expresio unius est exclusio alterius*," would apply; the grant of an express power to review in one case not specified. The subordinate position of the motion picture division and the supreme responsibility of the Regents to enforce the provisions and purposes of the statute preclude the application of the maxim here.

We may add that it seems most unlikely from a practical viewpoint that the legislature intended to leave the authorities helpless in a case where through some misconception or inadvertence on the part of the motion picture division a film was illegally licensed. Such would be the result, for instance, where an immoral picture happened to slip by the motion picture division through inadvertence or otherwise. In such a case it would have to be held, if petitioner is right, that the Regents could not correct the situation; and on the other hand, a criminal prosecution would be impossible because the film has been licensed (Penal Law, Section 1141). Such a stalemate would be repugnant to common sense, and every implication is against it. It furnishes ground for the belief that the legislature gave no specific grant of power to the Regents for a review when a license was granted because none was considered necessary; the power to correct was inherent in the statute.

There remains the issue as to whether the Regents acted arbitrarily and capriciously in the matter. Once the validity of the principle of censorship is admitted the issue in each case becomes one of judgment; in fact, that is one of the gravest arguments against the principle. The record before us indicates varying views as to whether the picture in question is so offensive to large groups within the Christian sect as to justify a finding that as to them it is sacrilegious. This conflict of views is proof that the issue is one of judgment to be resolved by the administrative body which has it in charge. The text and content of the picture itself, together with the complaints received, constituted substantial evidence upon which the Regents could act. Under the

familiar rule, applicable to all administrative proceedings, we may not interfere unless the determination made was one that no reasonable mind could reach. While some of us feel that the importance of the picture has been exaggerated we cannot justly say that the determination complained of was one that no reasonable mind would countenance.

The determination therefore should be confirmed with \$50 costs and disbursements.

### **EXHIBIT C**

#### **New York State Education Law**

##### **Section 120. Motion Picture division continued; organization**

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus of officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

(Officially certified transcript printed in McKinney's Consolidated Laws of New York, volume 16, at p. 22.)

##### **Section 122. Licenses**

The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted

to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.

(Officially certified transcript printed in McKinney's Consolidated Laws of New York, volume 16, at p. 23.)

*Section 129. Unlawful use or exhibition*

It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

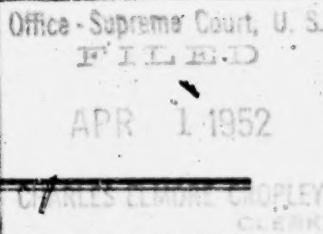
(Officially certified transcript printed in McKinney's Consolidated Laws of New York, volume 16, at p. 30.)

*Section 131. Penalty*

A violation of any provision of part two of this article shall be a misdemeanor.

(Officially certified transcript printed in McKinney's Consolidated Laws of New York, volume 16, at p. 31.)

LIBRARY  
SUPREME COURT, U.S.



# Supreme Court of the United States

OCTOBER TERM, 1951—No. 522

JOSEPH BURSTYN, INC.,

Appellant,

against

LEWIS A. WILSON, Commissioner of Education of the  
State of New York, *et al.*

## BRIEF FOR APPELLANT

EPHRAIM S. LONDON,  
Attorney for Appellant,  
150 Broadway,  
New York, N. Y.

## INDEX

	PAGE
Opinions Below .....	1
Jurisdiction .....	1
The Statutes Involved .....	2
Statement of the Case .....	2
Specification of Errors .....	8
Summary of Argument .....	8
Argument .....	10
Conclusion .....	46
Appendix .....	47

### TABLE OF CASES CITED

<i>Allen B. Dumont Laboratories v. Carroll</i> , 184 Fed. 2d 153 .....	20
<i>Associated Press v. United States</i> , 326 U. S. 1 .....	27
<i>Ballard v. United States</i> , 329 U. S. 187 .....	31
<i>Board of Education v. Barnette</i> , 319 U. S. 624 .....	38, 40
<i>Bridges v. California</i> , 314 U. S. 252 .....	21
<i>Burstyn v. Wilson</i> , 278 App. Div. 253; 303 N. Y. 242	11
<i>Cantwell v. Connecticut</i> , 310 U. S. 296 .....	11, 15, 24, 40, 42, 44
<i>Chastleton Corp. v. Sinclair</i> , 264 U. S. 543 .....	28
<i>Commonwealth v. Gordon, et al.</i> , 66 Pa. D. & C. Rep. 101 .....	23
<i>Connally v. General Constr. Co.</i> , 269 U. S. 385 .....	29, 32, 33

	PAGE
<i>Davis v. Beason</i> , 133 U. S. 333 .....	42
<i>DeJonge v. Oregon</i> , 299 U. S. 353 .....	21
<i>Dennis v. United States</i> , 341 U. S. 494 .....	21
<i>Douglas v. Jeannette</i> , 319 U. S. 157 .....	42, 44
<i>Everson v. Board of Education</i> , 330 U. S. 1 .....	41, 42
<i>Feiner v. New York</i> , 340 U. S. 315 .....	24
<i>Gitlow v. New York</i> , 268 U. S. 652 .....	26
<i>Grosjean v. American Press Co.</i> , 297 U. S. 233 .....	15, 26
<i>Hague v. C. I. O.</i> , 307 U. S. 496 .....	25
<i>Hannegan v. Esquire, Inc.</i> , 327 U. S. 146 .....	27
<i>Herndon v. Lowry</i> , 301 U. S. 242 .....	20, 39
<i>Home Bldg. &amp; L. Assn. v. Blaisdell</i> , 290 U. S. 398 .....	28
<i>Jordan v. DeGeorge</i> , 341 U. S. 223 .....	29
<i>Kovacs v. Cooper</i> , 336 U. S. 77 .....	12, 19, 42
<i>Kunz v. New York</i> , 340 U. S. 290 .....	15, 25, 32, 36, 40, 42, 44
<i>Lanzetta v. New Jersey</i> , 306 U. S. 451 .....	29, 33
<i>Largent v. Texas</i> , 318 U. S. 418 .....	15
<i>Lovell v. City of Griffin</i> , 303 U. S. 444 .....	11, 16
<i>Marsh v. Alabama</i> , 326 U. S. 501 .....	21
<i>Matter of American Committee on Maternal Welfare v. Mangan</i> , 257 App. Div. 570 .....	12, 17
<i>McCollum v. Board of Education</i> , 333 U. S. 203 .....	37, 41
<i>Murdock v. Pennsylvania</i> , 319 U. S. 105 .....	15, 27, 42, 43
<i>Musser v. Utah</i> , 333 U. S. 95 .....	29
<i>Mutual Film Corp. v. Ohio Industrial Comm.</i> , 236 U. S. 230 .....	10, 25, 26, 28

	PAGE
<i>Nashville, C. &amp; St. L. Ry. v. Walters</i> , 294 U. S. 405 . . . . .	28
<i>Near v. Minnesota</i> , 283 U. S. 697 . . . . .	16, 22, 25, 26, 27, 36
<i>Niemotko v. Maryland</i> , 340 U.S. 268 . . . . .	15, 24
<i>Patterson v. Colorado</i> , 205 U. S. 454 . . . . .	16, 17
<i>People v. Larsen</i> , 5 N. Y. S. 2d 55 . . . . .	12, 17
<i>Rex v. Nixon and Scroop</i> , 7 Car. & P. 442 . . . . .	35
<i>Rex v. Richardson</i> , 6 Car. & P. 335 . . . . .	35
<i>Reynolds v. United States</i> , 98 U. S. 145 . . . . .	42
<i>Saia v. New York</i> , 334 U. S. 558 . . . . .	42
<i>Schneider v. State</i> ; 308 U. S. 147 . . . . .	15, 21
<i>Small Co. v. American Sugar Ref. Co.</i> , 267 U. S. 233. .	34
<i>State v. Klapprott</i> , 127 N. J. L. 395 . . . . .	32, 44
<i>State v. Lerner</i> , 51 Oh. L. Abs. 321 . . . . .	23
<i>Stromberg v. California</i> , 283 U.S. 359 . . . . .	21, 29, 30, 36, 39
<i>Terminiello v. Chicago</i> , 337 U. S. 1 . . . . .	44
<i>Thomas v. Collins</i> , 323 U. S. 516 . . . . .	21, 26
<i>Thornhill v. Alabama</i> , 310 U. S. 88 . . . . .	21, 30, 36, 39
<i>United Artists v. Amity Amusement Corp.</i> , 188 Misc. 146 . . . . .	6
<i>United States v. Capital Traction Co.</i> , 34 App. D. C. 592 . . . . .	29
<i>United States v. Carolene Products Co.</i> , 304 U. S. 144 . . . . .	21, 28
<i>United States v. C. I. O.</i> , 335 U. S. 106 . . . . .	27
<i>United States v. Cohen Grocery Co.</i> , 255 U. S. 81 . .	31
<i>United States v. Paramount Pictures</i> , 334 U. S. 131	12
<i>Whitney v. California</i> , 274 U. S. 357 . . . . .	21
<i>Winters v. New York</i> , 333 U. S. 507 . . . . .	11, 23, 24, 27, 29, 30, 31, 32, 33, 34, 36, 39

**CONSTITUTIONAL PROVISIONS, STATUTES AND  
REGULATIONS CITED**

	PAGE
<b>Constitution of the United States:</b>	
First Amendment .....	11
Fourteenth Amendment .....	11
<b>Constitution of the Republic of Cuba (1940), Article 33 .....</b>	<b>16</b>
<b>Political Constitution of the Republic of Chile (1925), Article 10:3 .....</b>	<b>16</b>
<b>Constitution of the Republic of Guatemala (1945), Article 36 .....</b>	<b>16</b>
<b>Constitution of the Republic of Haiti (1946), Article 21 .....</b>	<b>16</b>
<b>Political Constitution of the Republic of Honduras (1936), Article 59 .....</b>	<b>16</b>
<b>Constitution of the Oriental Republic of Uruguay (1934), Article 28 .....</b>	<b>16</b>
<b>Constitution of Venezuela (1947), Article 37 .....</b>	<b>16</b>
18 United States Code § 1462(a) .....	21
28 United States Code § 1257(2) .....	1
The Defense Production Act of 1950 .....	14
50 United States Code App. § 2102(e) iii .....	14
7 and 8 George IV Ch. 29 Sec. 10 .....	35
24 and 25 Victoria Ch. 95 Sec. 1, 19 .....	35
<b>New York Education Law:</b>	
Section 101 .....	2, 47
Section 120 .....	2, 47
Section 122 .....	2, 15, 30, 48
Section 123(3) .....	2, 43, 48
Section 125 .....	2, 42, 49
Section 129 .....	2, 24, 50
Section 131 .....	2, 51

## PAGE

Rules and Regulations for Review and Licensing of  
Motion Pictures:

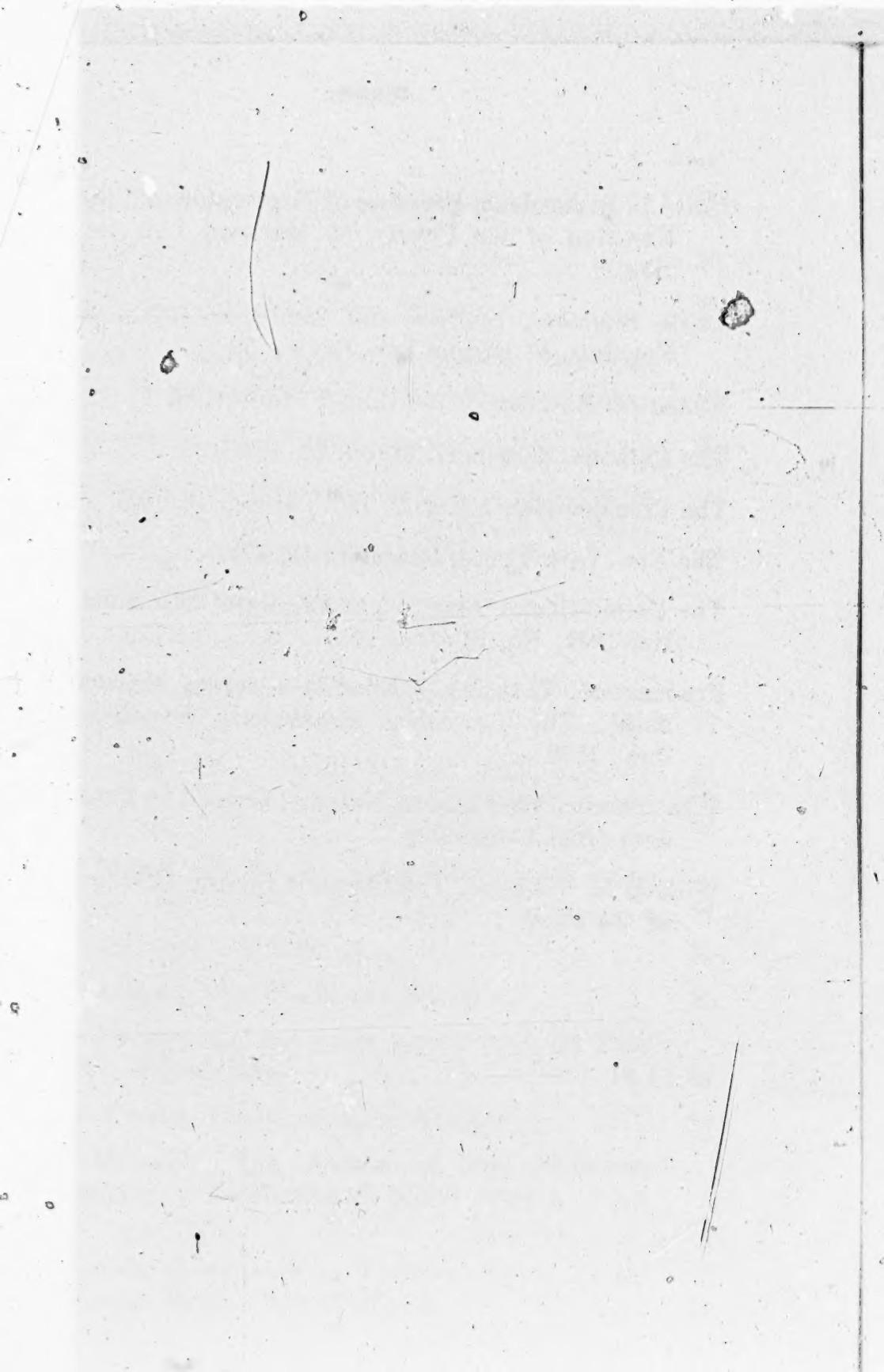
Section 237 .....	2, 52
Section 242 .....	2, 53
Section 244 .....	2, 30, 35, 43, 54

## TEXTS, ARTICLES AND PERIODICALS CITED

Phyllis Blanchard, The Child and Society .....	23
Louis R. Buder, Modern Religious Cults and Society .....	38
Blackstone's Commentaries (Lewis Ed.) .....	16
Books Into Films, Publishers Weekly .....	12
Censorship of Motion Pictures, 49 Yale Law Journal 87 .....	3, 15, 19, 22, 26
Zechariah Chafee, Jr., Free Speech in the United States .....	15, 22, 24, 26
Zechariah Chafee, Jr., Government and Mass Com- munication .....	15
Elmer T. Clark, The Small Sects of America .....	38
Commission on Freedom of the Press, "A Free and Responsible Press" .....	22
Due Process Requirements of Definiteness in Statu- utes, 62 Harvard Law Review 77 .....	29
Ernst and Lindey, The Censor Marches On .....	22
Everyman's United Nations .....	14
Film Censorship: An Administrative Analysis, 39 Columbia Law Review 1383 .....	18
John E. Harley, World Wide Influences of the Cin- ema .....	28

	PAGE
Healy and Bronner, <i>Delinquents and Criminals</i> ....	23
William E. Hocking, <i>Freedom of the Press</i> .....	16
Ruth A. Inglis, <i>Freedom of the Movies</i> .....	4, 22
Inseparability in Application of Statutes Impairing Civil Liberties, 61 Harvard Law Review 1208 ..	39
International Motion Picture Almanac, 1950-1951 ..	20
Eric Johnson, The Motion Picture as a Stimulus to Culture, The Annals of the American Academy of Political and Social Science, Nov., 1947 .....	28
Theodore Kadin, Administrative Censorship, 19 Boston University Law Review 533 .....	3, 15, 22
Kupferman and O'Brien, Motion Picture Censorship; 36 Cornell Law Quarterly 273 .....	15, 22, 26
Life Magazine (Asia Issue), Dec. 31, 1951, page 51	37
Roger Manville, Film .....	24
Cotton Mather, The Bloody Tenet Washed and Made White, chap. XLV .....	44
John Stuart Mill, On Liberty .....	25
Raymond Moley, Are We Movie Made? .....	23
Motion Pictures and the First Amendment, 60 Yale Law Journal 696 .....	3, 14, 15, 22
Amos J. Peaslee, Constitutions of Nations .....	16
Terry Ramsaye, The Annals of the American Academy of Political and Social Science, Nov., 1947 .....	28
Report of the Commission on Technical Needs, Press, Film and Radio, 1949, UNESCO .....	14

Elliot L. Richardson, Freedom of Expression and the Function of the Courts, 65 Harvard Law Review 1 .....	19
Clyde Simmons, Sources and Limits of Religious Freedom, 41 Illinois Law Review 53 .....	33
Statistical Abstract of the United States, 1951 .....	38
The Catholic Messenger, March 22, 1951 .....	7
The Commonweal, March 2, 1951; March 16, 1951 ..	7
The New York Times, December 12, 1951 .....	37
The United States Government Printing Office Bulletin, 1951, No. 21 .....	14
Frederic M. Thrasher, "Education versus Censorship", The Journal of Educational Sociology, Jan., 1940 .....	22
What Shocked the Censors, National Council on Freedom from Censorship .....	19
William H. Wickwar, The Struggle for the Freedom of the Press .....	16



# Supreme Court of the United States

OCTOBER TERM, 1951—No. 522

---

JOSEPH BURSTYN, INC.

Appellant,

against

LEWIS A. WILSON, Commissioner of Education of the  
State of New York, *et al.*

---

## BRIEF FOR APPELLANT

---

### Opinions Below

The majority, concurring and dissenting opinions in the Court of Appeals of the State of New York appear at R 144 and are reported at 303 N. Y. 242.

The opinion in the Appellate Division of the State of New York appears at R 88, and is reported at 278 App. Div. 253.

### Jurisdiction

The Jurisdiction of this Court is conferred by Section 1257(2) of Title 28 of the United States Code.

The judgment of the Court of Appeals of the State of New York was entered October 18, 1951. Application for appeal to this Court was made December 4, 1951. This Court noted probable jurisdiction February 4, 1952.

## The Statutes Involved

N. Y. Education Law § 129 and Regents' Rules § 242 make it unlawful to exhibit motion pictures in a public theater unless the pictures are licensed. Violation of the provision is a penal offense (Education Law § 131). The required licenses are issued by the Motion Picture Division, a subdivision of the State Education Department (Education Law §§ 120, 122; Regents' Rules § 237). The Education Department is governed by the Regents of the University of the State of New York, and the Commissioner of Education (Education Law § 101).

- » Before a license is issued for a film, it must be reviewed by the Director or other officer of the Motion Picture Division. The reviewers are empowered and directed to deny a license to any film found "obscene, indecent, immoral, inhuman, sacrilegious, or \* \* \* of such a character that its exhibition would tend to corrupt morals or incite to crime." (Education Law § 122; Regents' Rules § 244.)

*Permits* are issued without prior examination for motion pictures intended solely for religious, scientific or educational purposes (Education Law § 123(3)). Such permits are revocable by the Director of the Division (Education Law § 125), and may not be issued to any film found "obscene, indecent, immoral, sacrilegious," etc. (Regulations § 244).

The statutes and pertinent parts of the Regulations are set out in the Appendix.

## Statement of the Case

The subject of this appeal is the New York ban of the motion picture "The Miracle." Appellant, a distributor of moving pictures (hereafter referred to as the Distributor) owns the American rights to the film (R 3, 4). The Appellees, the Commissioner of Education and the Regents

of the University of the State of New York, (hereafter referred to as the Regents) banned the picture by revoking the licenses required by law for its exhibition.

The licenses had been issued by the state film censorship board, the Motion Picture Division. The Motion Picture Division is an agency of the Education Department and the Regents assumed the authority to cancel the licenses as the governors of the Education Department. (See preceding statement of the Statutes Involved.)

Two licenses were issued for "The Miracle." The first was issued to Lopert Films, Inc., in March, 1949 (R 4, 42). The second license was issued, in November, 1950, to the Distributor, who purchased the rights to "The Miracle" from Lopert (R. 4). The second license also covered two other films that had been combined with "The Miracle" under the title "Ways of Love."

"Ways of Love" was first shown in New York City on December 12, 1950. It was an immediate success (R 5, 13). The newspapers and magazine reviews were laudatory. The film was approved and recommended by the National Board of Review of Motion Pictures<sup>1</sup> as a feature especially worth seeing (R 44, 96), and on December 27, 1950, it was voted the best foreign language film of the year by the New York Film Critics (R 5, 44).

A print of "The Miracle" is made part of the record on appeal and is available for the Court's examination. It is, in brief, the story of a simple minded, deeply religious woman who is made pregnant by a stranger she

---

<sup>1</sup> The National Board of Review is an independent, non-profit organization formed to promote the development of motion pictures. The Board reviews and classifies motion pictures for subscribing communities, women's clubs, schools, libraries, parent-teacher associations, etc. (R. 44). Censorship of Motion Pictures, 49 Yale L. J. 87, 109; Theodore Kadin, Administrative Censorship, 19 Boston U. L. R. 533, 559; Motion Pictures and the First Amendment, 60 Yale L. J. 696, 714, fn. 40.

believes to be St. Joseph. When the woman learns she is with child, she imagines it was conceived without sin. The picture ends when the child is born (R. 43). It is a short film with few incidents. The emphasis in the direction is not on the story but on the portrayal of the principal character. There is nothing in the dialogue or action in the picture that would suggest that it is to be given any other than a literal meaning.

Shortly after the first showing of "The Miracle," the Legion of Decency, a Roman Catholic censorship board,<sup>2</sup> condemned the picture as irreligious (R 45) and the Education Department received a number of letters protesting against the exhibition of the film (R 49). The letters obviously were inspired by the Legion or its supporters. It was conceded by counsel for the Regents, on the argument in the New York Court of Appeals, that a large number of those who wrote letters condemning the picture probably had not seen it, for the letters were sent from areas where the picture had not been shown.

<sup>2</sup> The Regents, after they received the letters, determined to inquire into the matter. They appointed three of their number as a committee to review the picture (R 49). The committee saw the picture, found it sacrilegious (R 25-26), and was then reappointed to conduct a hearing on the question of whether the film was sacrilegious, and on the legal question of the Regents' power to revoke a license (R 30).\*

<sup>2</sup> Ruth A. Inglis, *Freedom of the Movies*, page 121.

\* There was no specific statutory authority for revocation in the absence of abuse of a license, and in the 24 years that the Motion Picture Division had been under their jurisdiction the Regents never revoked or attempted to revoke a license where there was no claim of abuse (R 14, 58). (See also R 161-163.)

The Distributor requested the committee to disqualify itself on the ground that it had prejudged the issue (R 33). The request was refused (R 33) and the committee, confining its determination to the legal question, found that the Regents had "the power of censorship of motion pictures", and the authority to rescind licenses (R 54). Thereafter the Regents issued an order cancelling the licenses for "The Miracle" on the ground that it was a sacrilegious mockery of the Divine Birth of Jesus (R 54-56).

The Regents went to great lengths to support their decision. To prove the film was intended to ridicule the Divine Birth, the Regents alleged that its principal characters were clothed in a manner calculated to suggest Saint Joseph and the Virgin Mary. They described "the costume of 'the stranger' in the picture as similar to the traditional images of the Saint \*\*\* (with), garments such as were used in the Holy Land in the time of Christ" (R 19). They described the woman as "dressed in clothes caricaturing those worn in church processions honoring the Virgin Mary" (R 19). Prints made from the film reveal that the stranger's garments consist of a U. S. Army (World War II) field jacket, U. S. Army olive-drab trousers, a U. S. Army fatigue cap, and U. S. government issue shoes. The woman was, in the scene referred to, dressed in a cotton house dress, and a woolen plaid shawl.

Though the Regents were unanimous in their opinion that "The Miracle" is sacrilegious, the weight of considered Christian opinion is to the contrary. The film was produced in Italy and was approved for exhibition by the Italian ministry (Exhibit 1, R 46). That approval is significant in view of the Lateran agreement requiring the suppression of whatever "may offend the Catholic religion" (Exhibit 2, R 47). The writer of the script, the producer and the director of the film, and the professional cast are all devout Roman Catholics and ob-

viously did not intend to commit sacrilege (R 43). The review of the picture in the Vatican newspaper L'Osservatore Romano made no criticism on religious grounds (Exhibit 4, R 96, 44). The film was passed without objection by the Vatican representatives at the Venice Film Festival (Exhibit 3; R 48, 44). And no objection to the film was made by the United States Customs when it was brought to America (R 44).

When the first license for the film was issued by the New York Motion Picture Division in February, 1949, Ward C. Bowen was then its director (R 42). The grant of a license was an affirmative determination by the administrative body charged with enforcement of the law that "the picture is not obscene, indecent, immoral, inhuman, sacrilegious \* \* \*". The Distributor relied on that determination when he purchased the film. Dr. Hugh Flick was Director when the second license was issued in 1950 (R 43). After the Legion of Decency protested against the showing of "The Miracle", Dr. Flick re-examined the film and determined again that it had been properly licensed (R 5, 43). A number of ministers and theologians—Congregationalists, Presbyterians, Episcopalians, Unitarians and members of the Evangelical and Reformed Church who saw the film in The Community Church in Boston (Exhibit 16, R 128) and in the Union and Princeton Theological Seminaries—found that the film was not sacrilegious (Exhibits 5-78, R 96-144). Indeed, all Protestant clergymen who expressed themselves publicly, were of that opinion (R 45, 166). Many found the picture pious and reverent (R 44; Exhibit 9, R 124; Exhibit 10, R 98). There is considerable Roman Catholic opinion in the United States to the same effect (R 45; Exhibits 53-A, R 137;

---

<sup>3</sup> *United Artists v. Amity Amusement Corp.*, 188 Misc. Rep. 146, 147 (N. Y. Supreme Court).

Exhibit 54, R 108; Exhibit 62, R 110).<sup>4</sup> Two American Catholic publications, *The Catholic Messenger* (a diocesan paper),<sup>5</sup> and *The Commonwealth*,<sup>6</sup> protested against the suppression of "The Miracle." Eminent authors, playwrights, educators, editors, publishers, radio commentators, curators of museums, artists, poets, business executives, and economists, of the Roman Catholic, Protestant and Jewish faiths, also indicated that they do not consider the film sacrilegious; and film critics of diverse faiths found "The Miracle" a devout and pious film (R 44). The picture was rejected by the purchasing agent for Communist controlled countries as "*pro-Catholic propaganda*" (R 45).

Immediately after the licenses for *The Miracle* were cancelled, the Distributor instituted proceedings to review the determination of the Regents and to enjoin the enforcement of the censorship law (R 3-8). The proceedings were heard by the Appellate Division of the Supreme Court (3rd Department) of the State of New York (B 60). The Appellate Division confirmed the determination of the Regents (R 87). An appeal was taken to the Court of

---

<sup>4</sup> Otto Spaeth, a distinguished Catholic layman, an official delegate to the First International Congress of Catholic Artists, and past president of the Liturgical Arts Society, wrote:

"At the outbreak of the controversy, I immediately arranged for a private showing of the film. I invited a group of Catholics, competent and respected for their writings on both religious and cultural subjects. The essential approval of the film was unanimous.

"There was indeed 'blasphemy' in the picture but it was the blasphemy of the villagers, who stopped at nothing, not even the mock singing of a hymn to the Virgin, in their brutal badgering of the tragic woman. The scathing indictment of their evil behavior, implicit in the film, was seemingly overlooked by its critics" (Exhibit 54).

<sup>5</sup> Issue of March 22, 1951, at page 4.

<sup>6</sup> March 2, 1951, page 507, March 16, 1951, page 567. See also R 160 (dissenting opinion of Judge Fuld).

Appeals, the New York State court of last resort. The Court of Appeals (with two Judges dissenting) affirmed the judgment of the Appellate Division (R 142).

### **Specification of Errors**

The respects in which the Court of Appeals of the State of New York erred are set forth in the Assignment of Errors (R 173). The specifications in substance charge that the court erred:

1. In sustaining the Regents' determination that "The Miracle" is sacrilegious.
2. In holding that the New York film censorship laws do not impose an unconstitutional restraint on freedom of expression and communication.
3. In holding that the meaning of the law is clear and definite and its enforcement did not deprive appellant of its rights and property without due process of law.
4. In holding that the censorship law as construed does not violate the constitutional guaranty of separate church and state.
5. In holding that the law as applied did not inhibit the free exercise of religion.

### **Summary of Argument**

1. We are here challenging the validity of the New York motion picture censorship laws. The statutes provide for inspection and licensing of films before they can be shown in a public theater. Presentation of a film without a license is a penal offense. Motion pictures are a means of communication within the protection of the amendments guaranteeing freedom of the press; the purported authority to the contrary is outdated and has in effect been over-

ruled. The statutes, in requiring permission from a government agency before a communication may be published, impose an unconstitutional restraint on the liberty of the press.

II. The statutes provide that a film shall be denied a license (*i.e.*, shall not be shown publicly) if *sacrilegious*. The word "sacrilegious" is not defined in the statute or in any regulation. It is so vague and indefinite, capable of so many interpretations, that the administrators of the law may apply it as they will in any given case. An adverse decision by the administrators results in the loss of substantial rights: the right of expression by means of talking-pictures, and the right to exhibit a film for profit. Since the vagueness of the law permits arbitrary application, one may be deprived of rights without "due process" of law. The statutes are, therefore, repugnant to the Fourteenth Amendment.

III. The statutes, in directing the censors to determine whether or not a film is *sacrilegious*, require them to make a religious judgment—and that judgment is the basis for official action. Nothing may be held *sacrilegious* unless judged according to a particular religious doctrine. The government sanction of religious dogma violates the constitutional fiat that church and state shall be separate.

IV. "The Miracle" was banned because, it was alleged to be a "visual caricature of religious beliefs held sacred." Caricature is an expression of disapproval or disagreement. The Constitutional guaranty of the free exercise of religion extends to the profession of religious disbelief and dissent. The freedom to express disbelief is not limited to any particular form or method or medium. An expression of disbelief may not be suppressed because it offends the sensibilities, or insults the cherished doctrine, of any religious group. If "The Miracle" did in fact ridicule religious doctrine, the suppression of the film on that ground was an unlawful interference with appellant's right of religious dissent.

## Argument

### POINT I

**The New York film censorship law imposes an unconstitutional restraint on freedom of expression.**

#### Precis

Motion pictures are a medium of expression and communication. As such they are entitled to the privileges, immunities and freedom guaranteed by the Constitution. The statutes under consideration provide for censorship and licensing of communications prior to their distribution or publication. The main purpose of the amendments prohibiting interference with the press is to prevent the imposing of restraints before publication.

We are not here concerned with punishment after distribution or exhibition, and it is not urged that exhibitors, distributors or producers of films should be free from responsibility for abuse of their constitutional rights. It is, on the contrary, urged that subsequent punishment for abuse is the appropriate remedy, and the only remedy consistent with the constitutional provisions guaranteeing liberty of the press.

There is no warrant for the exclusion of movies from the protection of the Constitution. Those who advocate censorship claim the power and influence of movies present a danger that can be met only by regulation prior to exhibition. The plain fact is that no such danger exists. Relying on *Mutual Film Corp. v. Ohio Industrial Comm.*, 236 U. S. 230 (1915) the majority in the Court below held that motion pictures "are primarily a form of entertainment, a spectacle or show, and not such vehicles of thought as to bring them within the press of the country" (R 156). The *Mutual Film* case has been all but explicitly overruled, and may no longer be considered controlling authority.

**Motion pictures are a medium of communication within the protection of the First and Fourteenth Amendments**

The freedom of the press guaranteed by the Constitution is not limited to the printed word. It extends to motion pictures and all other published media by which ideas are expressed and disseminated. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion" (*Lovell v. City of Griffin*, 303 U. S. 444, 452).

Static pictures in comic strips<sup>7</sup> and recorded voices<sup>8</sup> have been separately recognized as vehicles for the communication of ideas, entitled as such to the protection of the First and Fourteenth Amendments. Talking moving pictures are not in a different category because they project visual images and recorded voices. As Judge Fuld wrote in his dissenting opinion in the court below:

"A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed by the 'airborne voice,' the printed word of the 'still' picture, it is put forward by a 'moving' picture. The First Amendment does not ask whether the medium is visual, acoustic, electronic or some yet unheard-of device. It has readily accommodated itself to other products of inventive genius, to other advances in technology, such as the radio and television. If 'The Constitution deals with substance, not shadows,' if 'Its inhibition was levelled at the thing, not the name' (*Cummings v. Missouri*, 4 Wall. 277, 325), then surely, its meaning and vitality are not to be conditioned upon the mechanism involved" (R 169).

---

<sup>7</sup> *Winters v. New York*, 333 U. S. 507.

<sup>8</sup> *Cantwell v. Connecticut*, 310 U. S. 296, 301.

We are unable to follow the rationale of a decision that will recognize the comic strip as a vehicle of thought but will deny that recognition to motion pictures; that will concede the right of free press to a novel but will deny the right to a movie version of the same story<sup>9</sup>; that will deny the protection of the First Amendment to a moving picture, but extend that protection to still prints of the same film in a magazine.<sup>10</sup>

Three of the seven judges of the court below recognized motion pictures to be a medium of communication entitled to the liberty of the press. Judge Desmond, though he concurred with the majority in the Court of Appeals, agreed with Judges Fuld and Dye that "Motion pictures are \* \* \* not excluded from First Amendment coverage (*United States v. Paramount Pictures*, 334 U. S. 131, 166)."<sup>10</sup> The reference to *United States v. Paramount, supra*, is to the frequently quoted dictum of Mr. Justice Douglas, "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." See also Mr. Justice Black's dissent in *Kovacs v. Cooper*, 336 U. S. 77, 102 in which he said, "Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, *moving pictures* and public address systems \* \* \* The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition" (Emphasis ours).

---

<sup>9</sup> See "Books Into Films," a weekly column in Publishers' Weekly, listing books purchased for translation into movies.

<sup>10</sup> Photographs from The Miracle and a summary of the story appeared in Life Magazine (Exhibit 4). Cf. *Matter of American Committee on Maternal Welfare v. Mangan*, 257 App. Div. 570, and *People v. Larsen*, 5 N. Y. S. 2d 55.

Today movies perform the same functions as other media of the press. News-reels report current news, as do the daily papers.<sup>11</sup> Current films editorialize; they consider and comment on such social and political problems as the position of the negroes in the South,<sup>12</sup> anti-semitism,<sup>13</sup> the dangers of demagoguery,<sup>14</sup> juvenile delinquency,<sup>15</sup> the commercialism and corruption of college athletics,<sup>16</sup> the ruthlessness of yellow journalism,<sup>17</sup> the disabled veteran,<sup>18</sup> labor-management relations,<sup>19</sup> mob emotions,<sup>20</sup> the Klu Klux Klan,<sup>21</sup> alcoholism,<sup>22</sup> psychoanalysis,<sup>23</sup> the lack of proper facilities for treatment of mental illness,<sup>24</sup> communism,<sup>25</sup> nazism,<sup>26</sup> the degradation and corruption brought by war,<sup>27</sup> the brotherhood of nations,<sup>28</sup> euthanasia,<sup>29</sup> the problems of displaced persons,<sup>30</sup> the false worship of material success,<sup>31</sup> etc.

<sup>11</sup> Under New York Education Law § 123(1), news-reels may be shown without license or permit.

<sup>12</sup> Pinky; Intruder in the Dust.

<sup>13</sup> Crossfire; Gentleman's Agreement.

<sup>14</sup> All the King's Men.

<sup>15</sup> City Across the River; Bad Boy; Knock on Any Door.

<sup>16</sup> Saturday's Hero.

<sup>17</sup> Scandal Sheet; The Big Carnival.

<sup>18</sup> The Men; Bright Victory.

<sup>19</sup> Whistle At Eaton Falls; With These Hands.

<sup>20</sup> The Lawless; The Well.

<sup>21</sup> Storm-Warning; The Burning Cross.

<sup>22</sup> Lost Week-End.

<sup>23</sup> The Dark Past.

<sup>24</sup> Snake Pit.

<sup>25</sup> The Iron Curtain.

<sup>26</sup> Tomorrow the World.

<sup>27</sup> Three Came Home; Battleground.

<sup>28</sup> Berlin Express.

<sup>29</sup> Live Today for Tomorrow.

<sup>30</sup> The Search; Long Is the Road.

<sup>31</sup> Death of a Salesman.

Documentary films have the same unlimited range and scope as the non-fiction book. They inform about regional customs and mores,<sup>32</sup> promote reforms,<sup>33</sup> explain events,<sup>34</sup> record history,<sup>35</sup> and teach principals and processes.<sup>36</sup> The Federal Government has given official recognition to motion pictures as a means of disseminating information and ideas.<sup>37</sup> Government agencies have produced and distributed documentaries on virtually every subject from *Aeronautics* to *Zinc*. The U. S. Government Printing Office Bulletin 1951, No. 21, lists 3434 government films made for the purpose of informing and educating. The United Nations has also made extensive use of motion pictures to inform the world of its functions and purposes; and the United Nations Educational, Scientific and Cultural Organization has organized a communications program to increase understanding among the nations through films as well as through periodicals, books and the radio.<sup>38</sup>

Clearly motion pictures, like other forms of the press, express ideas and opinions, disseminate information, pro-

<sup>32</sup> *Nanook of the North*; *Louisiana Story*; *This is America* (series).

<sup>33</sup> *The River*; *The Quiet One*.

<sup>34</sup> *This is Korea*; *March of Time* (series).

<sup>35</sup> *Desert Victory*; *Dunkirk*; *Paris 1900*.

<sup>36</sup> *Principles of Dry Friction*; *Printing the Positive*; *Topsoil*.

<sup>37</sup> The Defense Production Act of 1950 exempts "books, magazines, motion pictures, periodicals or newspapers" from price controls. 50 U.S.C. App. § 2102(e) iii.

The term "informational media" as used in The Economic Cooperation Administration Act includes "books, motion pictures and periodicals," 14 Fed. Reg. 3916. See also Motion Pictures and the First Amendment, 60 Yale Law Journal 696, 702 footnote 16.

<sup>38</sup> *Everyman's United Nations*, New York 1948, p. 150, and Report of the Commission on Technical Needs, Press, Film and Radio, 1949, UNESCO, Paris.

selytize and entertain. They are entitled to the same rights and the same protections as the other divisions of the press.<sup>39</sup> If they have not fully realized their potential as an educational and cultural medium, that is the consequence, not a justification, of censorship.

**The statute creates a licensing system  
void on its face**

The New York Censorship Law (Education Law § 122) provides for inspection and licensing of films before they can be exhibited. It authorizes the licensors to determine what may or may not be shown. Any state law that imposes supervision over the content of communications prior to publication or exhibition violates the constitutional guarantees of the First and Fourteenth Amendments. *Grosjean v. American Press Co.*, 297 U. S. 233, 249; *Schneider v. State*, 308 U. S. 147 163-164; *Cantwell v. Connecticut*, 310 U. S. 296, 306; *Largent v. Texas*, 318 U. S. 418, 422; *Murdock v. Pennsylvania*, 319 U. S. 105, 114; *Niemotko v. Maryland*, 340 U. S. 268, 271; *Kunz v. New York*, 340 U. S. 290, 294.

The constitutional provision guaranteeing freedom of the press was adopted to prevent censorship prior to pub-

<sup>39</sup> The Commission on Freedom of the Press made as its first recommendation, after exhaustive studies of mass communications, "\*\*\*\* that the constitutional guaranties of the freedom of the press be recognized as including the radio and motion pictures" (Zechariah Chafee, Jr., *Government and Mass Communications* (1947), v. 2, p. 801). See also Kupferman and O'Brien, *Motion Picture Censorship*, 36 Cornell L. Q. 273; *Motion Pictures and the First Amendment*, 60 Yale L. J. 696, 701-710; *Censorship of Motion Pictures*, 49, Yale L. J. 87; Zechariah Chafee, *Free Speech in the United States* (1941) 544-548; Theodore Kadin, *Administrative Censorship*, 19 Boston U. L. R. 533, 552.

lication and distribution,<sup>40</sup> and was directed primarily against the system of licensing communications. *Near v. Minnesota*, 283 U. S. 697, 713-716; *Lovell v. Griffin*, 303 U. S. 444, 451-452; *Patterson v. Colorado*, 205 U. S. 454, 462. Licensing publications was the means used by the established church in England of controlling the first printing presses. The first struggle for freedom of the press was therefore, directed against the licensing system. William H. Wickwar, *The Struggle for the Freedom of the Press*, pages 14-15; William E. Hocking, *Freedom of the Press*, page 3 *et seq.*<sup>41</sup> Mr. Chief Justice Hughes, in writing of an ordinance which required a permit for the distribution of literature, said (*Lovell v. City of Griffin*, 303 U. S. 444, 451-452):

“We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the

<sup>40</sup> The Constitution of the Republic of Cuba (1940), Article 33 (Amos J. Peaslee, *Constitution of Nations I*, 532), the Political Constitution of the Republic of Chile (1925), Article 10:3 (Peaslee I, 414), the Constitution of the Republic of Guatemala (1945), Article 36 (Peaslee II, 77), the Constitution of the Republic of Haiti (1946), Article 21 (Peaslee II, 115), the Political Constitution of the Republic of Honduras (1936), Article 59 (Peaslee II, 140), the Constitution of the Oriental-Republic of Uruguay (1934), Article 28 (Peaslee III, 393), the Constitution of Venezuela (1947), Article 37 (Peaslee III, 475), all modeled on the First Amendment to the Constitution of the United States, expressly prohibit “previous censorship.” The Constitution of the Republic of Cuba protects expression “in writing or by any other graphic or oral means” and refers specifically to films.

<sup>41</sup> The first common law definition of the right of the press was a recognition of the illegality of any prohibition prior to publication; “but this (liberty of the press) constitutes in law no previous restraint upon publication \* \* \*” 4 Blackstone’s *Commentaries*, 151-152 (William D. Lewis, ed.).

press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing'. And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. See *Patterson v. Colorado*, 205 U. S. 454, 462 \* \* \*

A licensing system reduces the constitutional right of free expression to a privilege, a privilege to be doled out by the licensing authority. It is far more repressive than a law penalizing improper communications after publication.<sup>42</sup> There are few limitations on the licensor's discretion or power of censorship. A determination made by the licensor will not be interfered with unless it is one "that no reasonable mind could reach" (R 152). It is

<sup>42</sup> An illustration of the greater constraint imposed by a licensing statute is afforded by the cases involving "The Birth of a Baby." The picture was refused a license by the Regents of the State of New York. The court, upholding the Regents' denial of a license, noted that there was considerable difference of opinion with respect to the decency of the film, and concluded that the Regents' action was, therefore, not arbitrary or unreasonable. *Matter of American Committee on Maternal Welfare v. Mangan*, 257 App. Div. 570, 573 aff'd 283 N. Y. 551. Thereafter *Life Magazine* published a series of still pictures taken from the film, and its editor was charged with publishing indecent matter in violation of the Penal Law. The criminal court, in acquitting the editor, held that the difference of opinion with respect to the propriety of the pictures "demonstrates the necessity of avoiding arbitrary censorship by a court." *People v. Larsen*, 5 N. Y. S. 2d 55. The fact that there was reasonable opinion on both sides of the question thus sustained the administrative censorship by the licensors; but prevented prosecution under a penal statute punishing improper publication.

almost impossible to prove a determination to be entirely unreasonable when it is a matter of opinion.<sup>43</sup> Also there are no procedural safeguards under a state licensing system to insure a fair and unbiased hearing. In the instant case, the Distributor was not advised of the particulars of the charges made against "The Miracle" until the decision was rendered against it (R 58). The order initiating the proceedings to revoke the licenses for the picture provided that the hearing was "restricted to the submission of affidavits and oral arguments and a brief" (R 27). No opportunity for cross examination or challenging or answering any evidence was afforded. And the triers of the issues in the case had unanimously judged "The Miracle" sacrilegious before the date set for hearing (R 26, 30). Similar proceedings in a court of law would unquestionably have been declared a nullity.

Where censors are vested by statute with such broad powers and, as a practical matter, their decisions are final, it becomes largely a matter of chance whether their selec-

<sup>43</sup> "On its face the statute (N. Y. Education Law) seemingly makes a reversal of the censors' action a not too difficult task. In practice it is well nigh impossible. The odds are heavily against getting a film shown in New York after the censors have spoken. The New York censor board has never been reversed in court, and only in a few instances was its (negative) action vetoed by the Department of Education on appeal. This results from the rule that the only question before the court on appeal is whether the censors have abused their discretion. As long as they have exercised honest discretion and not acted unreasonably or arbitrarily, the court must sustain the action even though it personally disagrees with what was done. Over and over again it is properly stated that courts cannot substitute their judgment for that of administrative officers. But because of the necessarily vague standards set out to guide the censors, there will almost always be some evidence to sustain their determination, and so their action is in effect not subject to judicial review at all." Film Censorship: An Administrative Analysis, 39 Columbia L. R. 1383, 1397-1398.

tions are judicious or not.<sup>44</sup> As Dr. Samuel Johnson said, "If nothing may be published but what civil authority shall have previously approved, power must always be the standard of truth."

**The "Special Problems" presented by movies do not justify the restrictions imposed by the statute**

We have been reminded that we may not rest on formula, and that technological developments with respect to the means of communication have created special problems. (*Kovacs v. Cooper*, 336 U. S. 77, 95-96). Whatever technical problems are presented by talking-pictures, they do not justify disregard of the doctrine that there may not be regulation of the content of communications before publication. (*Kovacs v. Cooper*, 336 U. S. 77, 97; Elliot Richardson, Freedom of Expression and the Function of Courts 65 Harvard Law Rev. 1, pp. 20-21).

What are the special problems presented by motion pictures? The majority opinion of the New York Court of Appeals in this case suggests that, as movies exercise great influence on their audiences, the showing of uncensored films "may do incalculable harm and the State \*\*\* may afford protection as broad as the danger" (R 147). That is hardly consistent with the contention that movies are merely spectacles or circuses which do not communicate ideas.<sup>45</sup> It is, moreover, based on the undemocratic

<sup>44</sup> The decisions of the film censorship boards have in fact often been irrational and inconsistent. "If you could compare in parallel columns the cuts made by censors in the six states with censorship, you would find absurdity complete. What one board favors, another bans. Whole films prohibited in one state are licensed in another. The sum total of cuts in one film made by them all would in many cases leave almost nothing." *What Shocked the Censors*, published by National Council on Freedom from Censorship, page 15. See also *Censorship of Motion Pictures*, 49 Yale L. J. 87, 94-96, 98-100.

<sup>45</sup> "that the moving picture is a most effective medium for spreading ideas is, of course, no reason for refusing it protection. If only ineffectual expression is shielded by the Constitution, free speech becomes a fanciful myth." Judge Fuld in dissenting opinion below; R 171).

assumption that the people of the State are so morally weak that they will be corrupted by exposure to indecent or sacrilegious pictures; and that an administrative officer endowed with superior judgment (who will not himself be corrupted by continual exposure) is capable of determining what will, and what will not, be dangerous for the ordinary citizen to see. Whether or not it is sound the fundamental tenet of Democracy is that the people may be, and must be, trusted. Whatever the risk, it must be taken. That, to use VanWyck Brook's phrase, is "the American wager."

The conclusion that uncensored motion pictures present a danger to the public welfare and morality is contrary to fact. Only six states<sup>46</sup> and approximately fifty cities<sup>47</sup> have laws establishing motion picture censorship. The court may take judicial notice that the people of the several thousand cities in the other forty-two states have not been unredeemably corrupted by uncensored films. Even in states where only licensed movies may be exhibited in theaters, unlicensed films can be seen over television. *Allen B. Dumont Laboratories v. Carroll*, 184 Fed 2d 153, (3rd cir.). It cannot, therefore, be urged that the statutory system under consideration is a necessary or an appropriate means of meeting the alleged danger presented by unlicensed movies.<sup>48</sup>

No factual basis for the statement that unpurged films create a clear and present or probable danger to the public welfare has ever been presented. The mere apprehen-

<sup>46</sup> Massachusetts, Kansas, Maryland, New York, Ohio, Pennsylvania and Virginia.

<sup>47</sup> International Motion Picture Almanac (1950-1951), pp. 725-727.

<sup>48</sup> "The limitation upon individual liberty must have appropriate relation to the safety of the state." Mr. Justice Roberts, in *Herndon v. Lowry*, 301 U. S. 242, 258.

sion of a danger does not justify suppression. To justify restraint of expression there must be something more than a fear of harm to society. It must be shown that the danger is imminent and sufficiently grave to override society's interest in and need of free expression. It has been so frequently iterated that it is almost a commonplace that the democratic process is dependent on unhampered communication, and only the most serious and substantial evil—such as the danger of overthrow of the government by force—will justify any broad interference with the freedom of the press. *Dennis v. United States*, 341 U. S. 494, 503, 508-510, 585-586; *Marsh v. Alabama*, 326 U. S. 501, 508-509; *Thomas v. Collins*, 323 U. S. 516, 529-530; *Bridges v. California*, 314 U. S. 232, 262; *Thornhill v. Alabama*, 310 U. S. 88, 95; *Schneider v. State*, 308 U. S. 147, 161-162; *DeJonge v. Oregon*, 299 U. S. 353, 365; *Stromberg v. California*, 283 U. S. 359, 369; "The enactment of a statute," Mr. Justice Brandeis wrote in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 374, "cannot alone establish the facts which are essential to its validity." See also *United States v. Carolene Products*, 304 U. S. 144. Any contrary view would permit a state legislature to invest itself with emergency powers merely by reciting the existence of the emergency.

It is scarcely likely that the invalidation of the censorship laws will 'open the floodgates' to indecency, as the court below feared. The state laws punishing indecency and obscenity after publication, and the federal law prohibiting the importation and interstate transportation of "any obscene, lewd, lascivious, filthy \* \* \* motion picture film" (18 U. S. C. 1462 (a)) are sufficient deterrents to those who would be 'purveyors of immorality.' The Production Code Administration of the Motion Picture Association of America and unofficial pressure groups such as the Legion of Decency, General Federation of Women's Clubs, Protestant Motion Picture Council, etc., may also

be relied upon to keep motion pictures "pure."<sup>50</sup> The real danger is that those who seek to purify the movies will leave them sterile.<sup>51</sup>

Certainly, periodicals if mis-used have as great, if not a greater, potential for harm as improper motion pictures.<sup>52</sup> Motion pictures can reach only a limited number of people simultaneously. It may be assumed that the penal laws will be enforced with reasonable speed after exhibition, to prevent injury to any large number of people from indecent or immoral movies. Many tabloids and picture magazines, on the other hand, are distributed simultaneously to several million readers. The harm that may be caused by the publication of immoral, indecent or sacrilegious matter in periodicals could not be seriously urged today as justification for licensing them. As Mr. Chief Justice Hughes wrote in *Near v. Minnesota*, 283 U. S. 697, 720:

"The fact that the liberty of the press may be abused \* \* \* does not make any the less necessary the immunity of the press from previous restraint \* \* \*

<sup>50</sup> Ernst & Lindey, *The Censor Marches On*, page 86, *et seq.* Motion Pictures and The First Amendment, 60 Yale L. J. 696, 713-714; Kupferman & O'Brien, *Motion Picture Censorship*, 36 Cornell L. Q. 273, 299-300; *Censorship of Motion Pictures*, 49 Yale L. J. 97, pages 105 *et seq.* Ruth A. Inglis, *Freedom of the Movies* (1947), pages 151-171. Frederic M. Thrasher "Education versus Censorship", *The Journal of Educational Sociology*, Jan., 1940, pages 285, 287, 289; Theodore Kadin, *Administrative Censorship*, 19 Boston U. L. R. 533, 559-560.

<sup>51</sup> Ernst & Lindey, *The Censor Marches On*, pages 75-114; Zechariah Chafee, *Free Speech in the U. S.* (1941), pages 540-548.

<sup>52</sup> " \* \* \* they can debase and vulgarize mankind. They can endanger the peace of the world; they can do so accidentally, in a fit of absence of mind. They can play up, or down, the news and its significance, foster and feed emotions, create complacent fictions and blind spots, \* \* \* " The Commission on Freedom of the Press, "A Free and Responsible Press," page 3.

Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

The rule applies with equal force to talking pictures.

Collateral to the claim of need for censorship because of the insidious influence of the movies, is their alleged "potentiality for evil \* \* \* among the young"<sup>53</sup> (R 147). The potential evil effect of movies on children is of course, merely a matter of speculation. The objective studies on the subject have not led to any definite conclusion.<sup>54</sup> The need to protect the youth is the invariable argument of the censor's advocate. Even "Tom Sawyer" and "Huckleberry Finn" were said to corrupt the morals of children. *Commonwealth v. Gordon*, 66 Pa. D. & C. Rep. 101, 116. In any event, the fact that some films may not be suitable for children does not warrant the reduction, as Professor Chafee argues, "of all motion picture films to the level of a 12 year old child. Instead, we might better order the motion picture houses to exclude youngsters from certain plays and thus let adults chew occasionally on artistic and intellectual nourishment too tough for milkteeth. Also we can rely on groups of parents and other unofficial bodies to classify films according to their suitability for various ages. Or we might even go back to *laissez-faire* and trust sensible parents to keep their chil-

---

<sup>53</sup> See *Winters v. New York*, 333 U. S. 507, at page 510, indicating that the court was not persuaded by that argument.

<sup>54</sup> See Raymond Moley, *Are We Movie-Made*, page 33; Healy & Bronner, *Delinquents and Criminals*, page 181; Phyllis Blanchard, *The Child and Society*, pages 200-203. In *State v. Lerner*, 51 Oh. L. Abs. 321, 337-338, Judge Struble discusses a report of the American Youth Commission showing that most children receive their information or mis-information about sex from their contemporaries. Less than 1% were misled by the movies and an equal number in church.

dren at home from mature films." (Zechariah Chafee, Jr., *Free Speech in the United States* (1941) p. 543).

Statutes restricting expression, even where justified by an actual danger, must not be broader than is necessary to meet the evil. *Feiner v. New York*, 340 U. S. 315, 320; *Niemotko v. Maryland*, 340 U. S. 268, 271-272; *Winters v. New York*, 333 U. S. 507, 509; *Cantwell v. Connecticut*, 310 U. S. 296, 307-8. If the anticipated evil is the improper influence on children, then the application of the statute must be limited to pictures shown to children.<sup>55</sup>

The concurring opinion in the court below suggests the existence of still another danger,—danger to the public peace (R 159). The prevention of disorder is not the standard for censorship provided by the statute, and certainly it was not the reason for the suppression of "The Miracle." The picture has been shown extensively in various cities in the United States (including Washington, D. C.) and Italy and the exhibition never caused a breach of the peace or public disturbance. Moreover the statute regulates the showing of films in theaters, that is, on private property (New York Education Law § 129). The audience is not subjected to the communication. It must seek it out and pay an admission charge for the privilege of seeing and hearing it. If the audience to a motion picture is aroused to disorder, the hostile reaction of the audience is illegal, not the communication. The disorder would arise from the audience's intolerance of the views expressed and the vehemence of its reactions; and the authorities, therefore, would be obliged to restrain the audience, not pro-

---

<sup>55</sup> The classification of films for children has been tried successfully in England. Three types of certificates are given, a U, an A and an H. Any child can see a U (universally certificated) film. Children are not admitted to theaters showing an H film, and they may see A (adult) films when accompanied by a parent or guardian. Roger Manvell, *Film*, 163-164 (1950 Pelican Ed.).

hibit the picture.<sup>56</sup> *Kunz v. New York*, 340 U. S. 290, 294, 295; *Hague v. C. I. O.*, 307 U. S. 496, 516.; *Near v. Minnesota*, 283 U. S. 697, 721-722. If an utterance could be prohibited because it might arouse an audience on private property to violence, then, as John Stuart Mill noted, the least educated and most intemperate citizens would become the arbiters of permissible expression.<sup>57</sup> And as Chief Justice Hughes said, in *Near v. Minnesota*, 283 U. S. 697, 722, "The danger of violent reactions becomes greater with effective organization of defiant groups \* \* \* and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words."

#### **The Mutual Film case has in effect been overruled**

The appellees rely chiefly on *Mutual Film Corporation v. Ohio Industrial Comm.*, 236 U. S. 230, to support their position that motion pictures are not a part of the press. In that case, which was decided in 1915, the court sustained the validity of an Ohio statute similar to the New York film censorship law. It did so on the ground

"that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion" (p. 244).

<sup>56</sup> It has been suggested that the intention of the communication is a factor to be weighed in determining whether the utterance should be punished or a hostile audience curbed. The Problem of the Hostile Audience, 49 Columbia L. R. 1118, 1123. The producers of "The Miracle" have not been and cannot be charged with malicious intent. As previously noted, its director, script-writer and entire cast are all devout Roman Catholics.

<sup>57</sup> John Stuart Mill, *On Liberty* (Macmillan, 1926) Chap. II.

It will be noted that the court concerned itself solely with the question of whether the statute violated the *Ohio* Constitution. It was not until 1925, ten years after the decision in the *Mutual Film* case, that the provisions of the First Amendment relating to free press were held applicable to State legislation. That doctrine was first enunciated in 1925 in *Gitlow v. New York*, 268 U.S. 652, 666. See also *Near v. Minnesota*, 283 U. S. 697, 723-724. The *Mutual Film* case cannot, therefore, be considered as authority for the proposition that motion pictures may be denied the protection of the First (and Fourteenth) Amendments of the United States Constitution.

The constitutional concepts of freedom of speech and press, and the nature of motion pictures, have changed so fundamentally since the *Mutual Film* case, that the decision of the court in that case can no longer be considered controlling. Kupferman & O'Brien, Motion Picture Censorship, 36 Cornell Law Quarterly 273, 288; Censorship of Motion Pictures, 49 Yale Law Journal 87, 113, Chafee, Free Speech in the United States (1941), page 544.

The rationale of the *Mutual Film* case was that motion pictures could not be considered an instrument for the publication of ideas because they were "a business pure and simple," mere "spectacles" intended primarily for entertainment. After the *Mutual Film* case was decided, this Court determined that commercial enterprises, if media of communication, and publications intended for entertainment, were entitled to the freedoms guaranteed the press.

In *Grosjean v. American Press Co.* (1936), 297 U. S. 233, the court rejected the contention that the right of free speech should be denied corporate enterprises engaged in business for profit. Thereafter in *Thomas v. Collins* (1945), 323 U. S. 516, Mr. Justice Rutledge said (p. 531), "And the rights of free speech and a free press are not confined to any field of human interest. The idea

is not sound therefore, that the First Amendment's safeguards are wholly inapplicable to business or economic activity.”<sup>58</sup>

In *Hannegan v. Esquire, Inc.* (1946), 327 U. S. 146; 153, 158; and *Winters v. New York* (1948), 333 U. S. 507, this court also repudiated the proposition that the freedom of the press may be denied communications originated for the purposes of entertainment. In the *Winters* case, which involved the publication of comic books, Mr. Justice Reed wrote (p. 510):

“We do not accede to appellee’s suggestion that the constitutional protection for a free press applies only to the exposition of ideas. *The line between the informing and the entertaining is too elusive for the protection of that basic right.* Everyone is familiar with instances of propaganda-through fiction. *What is one man’s amusement, teaches another’s doctrine.* Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.” (Emphasis supplied.) ~

The impossibility of drawing a line between entertainment and the communication of ideas is best illustrated by the prevailing opinion in the court below. The court, after declaring “The Miracle” a spectacle that does not convey ideas, found that the film deprecated a religious doctrine.

---

<sup>58</sup> “It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.” Mr. Justice Douglas in *Murdock v. Pennsylvania*, 319 U. S. 105, 111.

In *United States v. C. I. O.*, 335 U. S. 106, Mr. Justice Rutledge said, in his concurring opinion page 155, “The (First) Amendment did not make its protections turn on whether the hearer or reader pays, or can pay for the publication or the privilege of hearing the oral \*\*\* pronouncement” (matter in parenthesis inserted); and see *Near v. Minnesota*, 283 U. S. 697, 720; *Associated Press v. United States*, 326 U. S. 1, 27-28 (concurring opinion of Mr. Justice Frankfurter).

The argument that movies are still mere spectacles that do not communicate ideas ignores the very significant changes that have occurred in the last 36 years. When the *Mutual Film* case was decided in 1915, the moving picture industry was in its infancy. That was the day of the nickelodeon, when most pictures were still in single reels (Terry Ramsaye, *The Annals of the American Academy of Political & Social Science*, Nov., 1947, pp. 4, 5). Motion pictures were, at that time, a trivial form of entertainment without significance. Through advances in techniques and subject matter, movies have become a potent influence on the culture and thinking of the civilized world.<sup>60</sup> See discussion, *infra*, at pages 13-14.

The *Mutual Film* case should, as Judge Fuld suggested, "be relegated to the history shelf"<sup>61</sup> (R 171). The reasoning underlying the opinion has been held erroneous, and the factual conditions on which the decision was predicated no longer exist. This case must be judged in the light of present circumstances and experience, and not in that of what once was said, nor in the light of conditions that may once have existed but no longer prevail. *United States v. Carolene Products*, 304 U. S. 144, 153; *Nashville C. & St. L. Ry. v. Walters*, 294 U. S. 405, 415; *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 443; *Chasteiton Corp. v. Sinclair*, 264 U. S. 543, 548.

<sup>60</sup> Eric Johnson, *The Motion Picture as a Stimulus to Culture*, *Annals of The American Academy of Political & Social Science*, Nov., 1947, 98; John E. Harley, *World Wide Influences of the Cinema*, pages 2-7.

<sup>61</sup> See also authorities referred to in footnote 39 *infra*, page 15.

## POINT II

**The statute under which "The Miracle" was suppressed is so vague that it is void on its face. The attempted enforcement of the statute deprived appellant of its rights and property without due process of law.**

There cannot be "due process of law" unless the process is under law. It is an ancient maxim that where the law is uncertain, there is no law, *ubi jus incertum, ubi jus nullum*. That maxim applies to a statute, such as the one here challenged, which is so vague that men of common intelligence cannot know its meaning. *Connally v. General Construction Co.*, 269 U. S. 385, 391; *Winters v. New York*, 333 U. S. 507, 518.

When a law is unclear, it does not furnish any guide or impose any standard upon those who must enforce it. As the administrators determine the boundaries of the law, and the extent of their powers under it, there is no guard against arbitrary enforcement. Also, since each administrator determines the meaning of the statute for himself, the application of the statute changes with the person of the administrator. The consequence is government not of law but by men. *Jordan v. DeGeorge*, 341 U. S. 223, 239-240; *Musser v. Utah*, 333 U. S. 95, 97; *Winters v. New York*, 333 U. S. 507, 515, 518; *United States v. Capital Traction Co.*, 34 App. D. C. 592, 596; Due Process Requirements of Definiteness in Statutes, 62 Harvard L. R. 77.

Another evil of vagueness in a statute is that those subject to the law cannot know what action is prohibited; they may be penalized for conduct they could not know was condemned. *Lanzetta v. New Jersey*, 306 U. S. 451, 453; *Stromberg v. California*, 283 U. S. 359, 368; *Connally v. General Construction Co.*, 269 U. S. 385, 391-393.

Indefiniteness is most pernicious in statutes regulating speech, press or religion. The vagueness of such laws per-

mits interpretation that will interfere with the exercise of basic civil rights. Where the normal construction of a statute would permit interference with expression or religion, the statute will be held void on its face. *Winters v. New York*, 333 U. S. 507, 512; *Thornhill v. Alabama*, 310 U. S. 88, 96-98; *Strömberg v. California*, 283 U. S. 359, 369. Inseparability in Application of Statutes Impairing Civil Liberties, 61 Harvard L. R. 1208.

The censorship law under consideration regulates a means of communication. The evil of the vagueness in the law was compounded by the construction of the court below permitting restraint of religious utterance. The law, in fact, as it was construed and applied in this case, affords an example of all the vices of indefinite statutes.

#### **The meaning of the law is obscure**

The statute in question provides that a film shall be denied a license (*i. e.*, shall not be shown in any theater in the state) if "obscene, indecent, immoral, inhuman, sacrilegious" \* \* \* or is of such a character that its exhibition would tend to corrupt morals or incite to crime.<sup>62</sup> (New York Education Law § 122, Regents' Rules § 242.) The Regents found "*The Miracle*" sacrilegious and rescinded its license on that ground (R 56). The word "sacrilegious" is not defined in the statute or in the regulations promulgated by the Regents.<sup>63</sup> No opinion has been found in any State or Federal report (other than the opinions in the instant case) in which the term is construed. The Court below adopted one of the dictionary definitions of sacrilege, *e. g.*, "the act of violating or profaning anything sacred" (emphasis ours) (R 151).

<sup>62</sup> With respect to the provision prohibiting films that "would tend to \* \* \* incite to crime" see *Winters v. New York*, 333 U. S. 507, 519-520.

<sup>63</sup> See Regulations § 244, Appendix, page 54.

The definition adopted by the court (which fixed the meaning of the statute for the purposes of this case, *Winters v. New York*, 333 U. S. 507, 514) does not limit the application of the term. "It leaves open \* \* \* the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can \* \* \* adequately guard against." *United States v. Cohen Grocery Co.*, 255 U. S. 81, 89. What is meant by "anything sacred"? Are only tangible things included, such as icons, the Cross of Jesus, the Star of David, or does the term also embrace ideas, customs, ceremonies? As the court below found that sacred beliefs are within the purview of the statute, the question arises as to whether *all* religious beliefs held sacred are included. Does the law shield Polygamy, Snake-worship, Demonism, Suttee, Voodoo, I-Am-ism<sup>4</sup> Exorcism, Bibliomancy, and Literal-Fundamentalism, from ridicule? In the dissenting opinion in the court below, Judges Fuld and Dye also ask, "At what point, \* \* \* (does) a questioning of particular religious dogma take on the aspect of 'sacrilege'? At what point does expression or portrayal of a doubt of some religious tenet become 'sacrilegious'?" (R 166). All of the questions with respect to the meaning and application of the provision are left for such solution as the individual administrators of the law may find.

**The statute permits arbitrary interpretation and enforcement**

The standard offered by the court below as a guide to those enforcing the statute has been held by this court to be so vague as to permit arbitrary interpretation. The majority opinion stated, " \* \* \* the standard to be applied \* \* \* is simply this: that no religion, as that word is understood by the ordinary reasonable person, shall be treated

<sup>4</sup> *Ballard v. U. S.*, 329 U. S. 187.

with contempt, mockery, scorn and ridicule" (R 154). In *Kunz v. New York*, 340 U. S. 290, a New York City ordinance, which made it unlawful "to ridicule or denounce any form of religious belief," was held unconstitutional. Mr. Chief Justice Vinson, writing for the court in the *Kunz* case described the ordinance as vesting "restraining control over the right to speak on religious subjects in an administrative official, where there are no appropriate standards to guide his action" 340 U. S. 290, 295. (Emphasis supplied.) There is no substantive distinction between the statute under consideration, as construed by the court below, and the ordinance struck down in the *Kunz* case. See also *State v. Klapprott*, 127 N. J. L. 395 (cited with approval in *Winters v. New York*, 333 U. S. 507, 516), which held that a statute prohibiting incitement of "hatred, abuse, violence or hostility against any group of persons \*\*\* by reason of race, color, religion" was unconstitutional because its language was so general as to permit unlawful interference with freedom of expression.

Judge Desmond, in his concurring opinion in the court below, noted that the courts have not found the word "obscene," too general for application (R 158-159); and concluded that the term "sacrilegious" ought not to present any difficulties. The learned Judge failed to consider that the word "obscene," though general, has been judicially interpreted while the word "sacrilegious" has not been. The meaning of "obscene" has been defined and limited by judicial opinion. By reference to the opinions the application of the term may be ascertained by those affected by the statutes and those enforcing it. *Winters v. New York*, 333 U. S. 515, 518; *Connally v. General Construction Co.*, 269 U. S. 383, 391. No such definition or authority was available to those seeking to learn the meaning of "sacrilegious" in the statute under consideration.

**The interpretation and applications  
of the statute were inconsistent**

A statute is unconstitutionally vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Winters v. New York*, 333 U. S. 507, 517-518; *Connally v. General Construction Co.*, 269 U. S. 385, 391; *Lanzetta v. New Jersey*, 306 U. S. 451, 453. The word sacrilegious, as interpreted by the New York Court of Appeals, is one about which men of common and of uncommon intelligence must necessarily differ. The Regents argued in the court below, "anything is only sacrilegious to those persons who hold the (profaned) concept sacred." (Matter in parenthesis inserted.) (R 167). Unless all the administrators of the law hold the same concepts sacred, there will inevitably be differences in the application of the term. "In the very nature of things, what is 'sacrilegious,' will of necessity differ with the philosophy, the training, the education and the background of the particular censor of the moment, the determination whether a film is 'sacrilegious' or not, must necessarily rest in the undiscoverable recesses of the official's mind." (Judge Fuld in the dissenting opinion below, R 166.)

"The Miracle," it will be recalled, was licensed twice by the Motion Picture Division, the agency charged with enforcement of the statute. The Division was under new directorship when the second of the licenses was issued. The approval of the film was not the result of perfunctory examination; it was the considered and carefully re-considered decision of the administrative experts in the field. Despite the determination of the Motion Picture Division, the Regents found the film sacrilegious, and argued in the court below that it was sacrilegious as a matter of law. The contradictory applications and inconsistent in-

terpretations of the statute<sup>65</sup> were not due to any incapacity or malfeasance of the administrators. They were the result of the ambiguity of the term applied. "Sacrilegious" like "heresy" is a word without moorings. It shifts and changes in meaning as it is used by persons with differing religious beliefs. As there is no general agreement with respect to the things that are sacred, there can not be agreement with respect to what constitutes sacrilege (*i. e.*, a profanation of sacred things according to the Regents' definition).

**Appellant could not have known  
what the law prohibited**

It is a fundamental principle of justice and fair play that one ought not to be punished for offending against a law unless a reasonable opportunity to avoid the offense is afforded. Obviously a thing cannot be avoided unless it is known, or there is at least a means of learning what it is. When a statute is ambiguous, those governed by it, cannot know what it means or predict the way it will be applied. If the wording of a statute is such that the accused could not have known in advance that his actions came within them, the conviction amounts to enactment of a new statute by the court and is a denial of due process. *Winters v. New York*, 333 U. S. 507, 515. The rule applies to civil, as well as criminal penalty and to statutes, such as the ones under consideration, which deprive one of prospective gain. *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 239.

Certainly the Distributor in the instant case could not have known "The Miracle" violated the censorship law. He had only the bare language of the statute and of the regulations, which use the same terms, to guide

<sup>65</sup> Cf. The Regents' pronouncement on the sacrilege in "The Miracle" (R 55) and the views set forth in the Exhibits (R 96-114).

him.<sup>66</sup> The word sacrilege, as defined in the standard dictionaries, relates to the desecration or stealing of a religious object. The word is derived from the Latin *sacer* sacred, and *legere* to gather, pick up; i. e., to pick up or steal sacred things. It is defined in Bouvier's Law dictionary (1928) as "The act of stealing, from the temples or churches dedicated to the worship of God, articles consecrated to divine uses \* \* \* Also the alienation to laymen of property given to pious uses." In Ballentine's Law Dictionary (2nd edition) sacrilege is defined as, "The larceny of sacred things from a church." Even the dictionary definition adopted by the majority in the court below referred to the profanation of anything sacred (R 151). The only judicial construction of the word "sacrilege" relates to the English statutory crime of breaking and entry into, and committing a felony in, a place of divine worship (7 & 8 Geo. IV, c 29 Sec. 10; 24 & 25 Vict. c 95 Sec. 1, 19).<sup>67</sup> As the legal and dictionary

<sup>66</sup> The Regents' Regulations which should elucidate and clarify the statute, merely repeat its equivocal provisions. Section 244 of the Regulations states, "No motion picture shall be licensed \* \* \* the whole or any part of which is \* \* \* sacrilegious \* \* \*" (Appendix p. 54). The standards of the law prescribed by the Regents reaffirm, "No motion picture will be licensed \* \* \* which may be classified, or any part thereof, as \* \* \* sacrilegious \* \* \*" (Appendix p. 54). The "interpretations" recall W. H. Auden's lines,

"Law, says the judge as he looks down his nose  
 Speaking clearly and most severely,  
 Law is as I've told you before,  
 Law is as you know I suppose,  
 Law is but let me explain it once more,  
 Law is the Law."

From *Law Like Love*, The Collected Poetry  
 of W. H. Auden, p. 75.

<sup>67</sup> It is significant that the English crime of Sacrilege applies only to the breaking and entry into an edifice of the established church. Entry into and theft from a church of any dissenting religion is Burglary. (*Rex v. Nixon and Scroop*, 1836, 7 Car & P 442; *Rex v. Richardson*, 1834, 6 Car & P 335).

definitions of the word relate to physical acts and tangible objects, the Distributor could not have anticipated that the statute would be applied to an alleged attitude towards religious dogma.

When the Distributor purchased the picture, it had already been licensed, *i. e.*, certified as *not* sacrilegious. As there was no express provision of the statute authorizing cancellation of a license the Distributor had no reason to suspect that the determination of the Motion Picture Division was not final.<sup>68</sup> Under the circumstances, only a clairvoyant could have predicted that "The Miracle" would offend against the statute.

**The statute authorized punishment  
of communications within the  
protection of the Constitution**

Uncertainty as to the effect or application of a law must cause the greatest concern when the statute involves or regulates communication or religion. The very existence of the statute, apart from its improper enforcement in a given case, inhibits expression or the free exercise of religion. *Winters v. New York*, 333 U. S. 507, 509-10; *Thornhill v. Alabama*, 310 U. S. 88, 96-98; *Stromberg v. California*, 283 U. S. 359, 369.

"The power of the licensor \*\*\* is pernicious not merely by reason of the censure of particular comments, but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near v. Minnesota*, 283 U. S. 697, 713. \*\*\* The existence of

<sup>68</sup> See *Klux v. New York*, 340 U. S. 290, 292, in which this Court questioned the propriety of revoking a permit where the ordinance regulating the issuance of permits does not specifically confer the power of revocation.

such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." Mr. Justice Murphy in *Thornhill v. Alabama*, 310 U. S. 88, 97-98."

The law as it was construed by the court below would permit the suppression of a number of perfectly proper and creditable films. The New York Court of Appeals, it will be recalled, held that the ban of the statute extends to motion pictures that violate or profane anything sacred to any religion "as that word (religion) is understood by the ordinary reasonable person" (R 151, 154). There are 256 recognized religious sects in the United States (*McCollum v. Board of Education*, 333 U. S. 203, 235). Each has some separate doctrines it holds sacred. If the statute is to be applied impartially, as it obviously has not been, the doctrines of all the 256 sects must be protected against condemnation and disparagement. Films advocating armament for defense could be suppressed under the statute because they offend against the Quaker doctrine that war is contrary to the law of God. Films on surgery or medical treatment might not be licensed because repugnant to the tenets of Christian Scientists.<sup>69</sup> Most of the films made in Hollywood could be suppressed as offensive to the religious beliefs of Hindus.<sup>70</sup> A film showing a

<sup>69</sup> The ban of such films is within the realm of probability. The Regents recently ordered the deletion of all examination questions relating to the germ theory of disease because offensive to Christian Scientists. The New York Times, December 12, 1951, page 39, col. 5. The Christian Scientists, to their credit, were among the first to object to that accommodation to their religious views. The New York Times, Dec. 13, 1951, page 68, col. 3.

<sup>70</sup> Most Hollywood features are completely remade in India because the Hindu religion prohibits, among other things, the display of physical passion. (Life Magazine, Dec. 31, 1951, page 51.)

salute to the American flag could be prohibited because that violates the religious sensibilities of Jehovah's Witnesses (*Board of Education v. Barnette*, 319 U. S. 624). A film on the Evolution of Man or Paleontology might be suppressed as obnoxious to Literal Fundamentalists. The statute as interpreted would justify the prohibition of pictures showing life insurance, lightning rods (anathema to the Brethren in Christ and Mennonites because they indicate a distrust of Divine Providence),<sup>71</sup> cooked foods,<sup>72</sup> burial of the dead,<sup>73</sup> jewelry,<sup>74</sup> tobacco,<sup>75</sup> shaving.<sup>76</sup> The censors would not be justified in ignoring the religious convictions of any particular group on the ground that it is a minority, for every religious group in the United States is a minority.<sup>77</sup> Under the statute as interpreted, any film based on the tenets of a religious group could be prohibited for the beliefs of the 256 sects in the United States are in conflict. The orthodoxy of one group is the heresy of another, or as Prof. H. W. Janson put it, "one man's sacred cow is another's sacrilege."

The possibilities of abuse inherent in the statute renders it void in its entirety. "It is settled" as Mr. Justice

<sup>71</sup> Louis R. Binder, *Modern Religious Cults and Society*, page 130; Elmer T. Clark, *The Small Sects of America*, page 212.

<sup>72</sup> Forbidden to Doukhobors, Louis R. Binder, *supra*, pages 148-149.

<sup>73</sup> Opposed by members of the United Pentecostal Church, Elmer Clark, *The Small Sects of America*, page 212.

<sup>74</sup> Offensive to members of The Church of Nazarene, Frank S. Mead, *Handbook of Denominations in the United States*, page 58.

<sup>75</sup> Forbidden by the Church of the House of David, Mead, *supra*, page 97.

<sup>76</sup> The only religious majority in the United States is the non-church goer. The churches and religious groups claim a total membership of only 77,386,166. (Statistical Abstract of the United States, 1951, page 27.) It has been suggested that even the non-church goers fall into minority groups, depending on the churches they are staying away from. Clyde Simmons, *Sources and Limits of Religious Freedom*, 41 Illinois L. R. 53, 71.

Reed said in *Winters v. New York*, 333 U. S. 507, 509, "that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void on its face as contrary to the Fourteenth Amendment. *Stromberg v. People of the State of California*, 283 U. S. 359, 369; *Herndon v. Lowry*, 301 U. S. 242, 258. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such statute's inclusion of prohibitions against expressions protected by the principle of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press." See also, *Thornhill v. Alabama*, 310 U. S. 88, 96-98; Inseparability in Application of Statutes Impairing Civil Liberties, 61 Harvard L. R. 1208, 1209-1210.

### **POINT III**

#### **The statute violates the constitutional guaranty of separate church and state.**

The Court of Appeals held that the purpose of the statute under consideration is to bar a "visual caricature of religious beliefs held sacred by one sect or another" (R 154). The censor, in applying the statute, must determine that a belief is a religious one, that it is held sacred by a sect, and that the film under consideration caricatures the belief. It is thus impossible to enforce the law without making a religious judgment and without adopting some specific religious dogma as a criterion. In the instant case, the Regents determined that "The Miracle" is sacrilegious because it ridicules the Divine Birth of Jesus (R 55). The Gospel according to St. Matthew, chap. I, 18-25, is cited as authority that the concept is sacred (R 55). The scriptural passages referring to the nativity of Jesus were thus made a standard for official action, and a religious dogma was made the basis for government censorship.

Any state law requiring a government official to pass on substantive matters of religion is a law respecting the establishment of a religion and contravenes the First and Fourteenth Amendments. *Cantwell v. Connecticut*, 310 U. S. 296, *Kunz v. New York*, 340 U. S. 290. As Mr. Justice Frankfurter observed, "It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong." *Board of Education v. Barnette*, 319 U. S. 624, 654 (dissenting opinion).

The law struck down in *Cantwell v. Connecticut*, *supra*, required persons soliciting funds for a religious cause to secure a permit from the state Public Welfare Council. Mr. Justice Roberts, writing for a unanimous court, said (p. 305) :

"It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."

In the instant case, as in the *Cantwell* case, the statute authorizes public officers to pass judgment on matters of religion, to refuse a license on religious grounds, and to suppress religious opinions that offend them. See also *Kunz v. New York*, 340 U. S. 290, 293.

"The 'establishment of religion' clause of the First Amendment," Mr. Justice Black wrote in *Everson v. Board of Education*, 330 U. S. 1, 15, "means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another* \*\*\* No person can be punished for entertaining or professing religious beliefs or disbeliefs \*\*\* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'" (emphasis supplied). See also, *McCollum v. Board of Education*, 333 U. S. 203, 210-211.

Clearly the statute under consideration if intended as the Appellees say, to prevent offenses against religion, was a law to "aid all religions" and therefore directly within the ban of the First Amendment. The fact that the section purports to protect all faiths against sacrilege does not vindicate it. The same point was urged and rejected in the *McCollum* case *supra*.

The Regents concede that any construction of the term sacrilegious denoting a support of the views of one religious sect over the views of others would be inconsistent with the constitutional mandate that Church and State be kept separate. A preference was indicated in this case. Only a group within the Roman Catholic Church found "The Miracle" sacrilegious. Leaders and ministers of Episcopal, Presbyterian, Congregational, Unitarian, Evangelical and Reformed Churches found the film religious (R 96-109, Exhibits 6-55). All Protestant ministers who expressed themselves publicly, and there were a large number, found that the film was not sacrilegious (R 160). In declaring "The Miracle" sacrilegious, the Regents thus were adopting and enforcing the opinion of one segment of a religious group as opposed to the opinions of all others.

The intent of the Constitutional Amendment forbidding the establishment of a religion was to keep religion outside the scope of government activity. The State policy of non-interference in religious matters is a measure of political expedience. With a citizenry marked by wide religious and denominational differences, any policy other than absolute neutrality would lead to conflict. *Davis v. Beason*, 133 U. S. 333, 342; *Reynolds v. United States*, 98 U. S. 145, 162-164; *Everson v. Board of Education*, 330 U. S. 1, 8-15.

The effect of the Regents' ban of "The Miracle" was to impose the religious views of a minority upon all the citizens of the state. The intense resentment of the members of the other religious groups in the state was the natural, foreseeable consequence of any such intervention by the government in a matter relating to religion.

#### **POINT IV**

**The statute violates the constitutional guaranty of freedom of religion.**

Freedom of religion, guaranteed by the Constitution, is not limited to church activities, or to utterances from the pulpit. It extends to and protects religious communications wherever and however made. Religious utterances on street corners (*Kunz v. New York*, 340 U. S. 290, 293), in pamphlets (*Murdock v. Pennsylvania*, 319 U. S. 105, 106), on phonograph records (*Cantwell v. Connecticut*, 310 U. S. 296, 301; *Douglas v. Jeanette*, 319 U. S. 157, 167), and over loud speaker systems (*Saia v. New York*, 334 U. S. 558, 559),<sup>77</sup> all receive the same protection afforded sermons

<sup>77</sup> The "burial" of the *Saia* case by the decision in *Kovacs v. Cooper*, 336 U. S. 77, does not affect the validity of the principle for which the case is cited.

preached in a place of worship. No conceivable reason exists for the denial of that protection to religious utterances in talking pictures.<sup>78</sup>

The prevailing opinion in the court below suggests that as motion pictures are exhibited for commercial gain they may not be considered religious communications (R 154, 155, 156). The fact that payment is received does not, of course, change the nature of the utterance, nor deprive it of its constitutional protection. "If it did, then the passing of the collection plate in church would make the church service a commercial project." (Mr. Justice Douglas, in *Murdock v. Pennsylvania*, 319 U. S. 105, 111). Any such criteria would prove fatal to the existing churches.

The constitutional guaranty of freedom of religion extends to statements concerning religion, whether of belief or dissent, and whether of faith or protest. Statement of belief in one religion indicates disbelief in or disavowal of all others. Each religious group proclaims its followers the only "true believers" and brands all others as infidel, heathen, heretic, idolatrous, bigoted, etc. It is impossible to state at what point proselytizing ends and abuse of other religious beliefs (or sacrilege, as the Regents define the word) begins. Whether a statement is religious or sacrilegious obviously depends on the beliefs of the person rendering judgment.<sup>79</sup> To justify the condemnation of a

<sup>78</sup> The majority opinion below states, "Religious presentations, as ordinarily understood, as well as other educational and scientific films, are exempt (Education Law, sec. 123). Thus freedom of religion is not impaired in the slightest, as anyone may express any religious or anti-religious sentiment he chooses through a proper use of the films" (R 153-154). The exemption of films intended solely for religious purposes from the requirement of a license does not afford them any protection at all. Religious films are issued permits, as distinguished from licenses, N. Y. Education Law 123(3). But permits are revocable without a hearing, N. Y. Education Law § 125; and the Regents have provided by Regulation (§ 244) that no picture shall receive a permit if sacrilegious.

<sup>79</sup> It will be remembered that Christ was accused of blasphemy, The Gospel according to St. Matthew, 23:65.

oo

communication on the ground that it is sacrilegious is very like Cotton Mather's justification of the punishment of dissenters: "To persecute is to punish an *innocent* but a heretic is a culpable and damnable person." (Cotton Mather, *The Bloody Tenet Washed and Made White*, Ch. XLV.)

The fact that a statement of disbelief is insulting or offensive to those who hold a doctrine sacred cannot justify restraint of the expression. *Kunz v. New York*, 340 U. S. 290, 294; *Murdock v. Pennsylvania*, 319 U. S. 105, 116. Communications may not be repressed merely because they offend the sensibilities of a religious group, no matter how large. Phonograph records denouncing the Roman Catholic Church as "an instrument of Satan" played in the streets in a predominantly Catholic neighborhood were held by this court to be utterances entitled to the protection of the Constitution (*Cantwell v. Connecticut*, 310 U. S. 296, 309). This Court afforded the same protection to a speech delivered on the public streets attacking Jews as "Christ-killers", and the Pope as "the Anti-Christ" (*Kunz v. New York*, 340 U. S. 290, 296); to pamphlets assaulting the established churches (*Murdock v. Pennsylvania*, 319 U. S. 105, 116); to phonograph records played to Roman Catholics on Palm Sunday that described the Catholic Church as a "snare" and a "racket" (*Douglas v. Jeanette*, 319 U. S. 157, 167-168); to books ridiculing the religious uses of holy-water, votive candles, and the doctrine of purgatory (*Douglas v. Jeanette*, *supra*, p. 172).<sup>80</sup> (See also *State v. Klapprrott*, 127 N. J. L. 395.) As Mr. Justice Roberts wrote, in *Cantwell v. Connecticut*, 310 U. S. 296, 310:

---

<sup>80</sup> "In considering abuse of freedom by provocative utterances it is necessary to observe that the law is more tolerant of discussion than are most individuals or communities," Mr. Justice Jackson, dissenting opinion in *Terminiello v. Chicago*, 337 U. S. 1, 32.

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

"The 'Miracle'" was religious in intent. But even if the Regents' interpretation of the film is accepted, the "caricature" of religious dogma does not justify the suppression of the picture. The alleged derision of sacred doctrine in "The Miracle" is not direct; it is said to be implied by the theme and the use of biblical text. If it did exist, the derision was most subtle,<sup>51</sup> and hardly of the kind to move an audience to violence. As Judge Fuld said, "• • • the film in question makes no direct attack on, or criticism of, any religious dogma or principle, and it is not claimed to be obscene, scurrilous, intemperate or abusive. Nor is there any evidence of any malicious purpose or intention on the part of the producers of the film to revile or even attack Catholic doctrine or dogma, nor any suggestion of any reasonable likelihood of a breach of the peace resulting from the film's exhibition" (R 167-168).

If books were proscribed for the reasons advanced for the ban of "The Miracle", political progress would have been seriously impeded, and literature, philosophy, and jurisprudence greatly impoverished. The ban would have

<sup>51</sup> The writer, actors, producer, and Vatican critics, among others, were unaware of it (R 15, 43).

included works of John Milton, Francis Bacon, Jeremy Bentham, Thomas Hobbes, John Locke, John Stuart Mill, Addison and Steele, Oliver Goldsmith, Immanuel Kant, Maimonides, Spinoza, Sterne, Swedenborg, Balzac, Bergson, Cato, Comte, Benedetto Croce, D'Annunzio, Daudet, Defoe, Descartes, Diderot, Dumas (father and son), Grotius, Flaubert, De la Fontaine, Anatole France, Edward Gibbon, Voltaire, Heine, Hugo, David Hume, Maeferlinck, Montaigne, Montesquieu, Pascal, Racine, Renan, Rousseau, Stendahl, Zola, to mention but a very few (of the classics proscribed by the Index Liborum Prohibitorum (1940) on the ground that they violate or profane sacred belief).<sup>\*\*</sup>

We cannot gauge the damage caused by the censorship of motion pictures. But we may be certain that the great promise of the medium will not be fulfilled until it is free of the restraints of the licensing statutes here challenged.

## CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

EPHRAIM LONDON,  
150 Broadway,  
New York, N. Y.,  
Attorney for Appellant.

CLENDON H. LEE,  
MILTON H. SPIERO,  
LEONARD P. SIMPSON,  
*of Counsel.*

March, 1952.

---

<sup>\*\*</sup> The writings banned under the General Index for the same reason are legion.

## Appendix

### New York Education Law

#### Article 3, Part I—General Provisions

##### § 101—Education department, regents of the university

There shall continue to be in the state government an education department. \* \* \* The head of the department shall continue to be the regents of The University of the State of New York, who shall appoint, and at pleasure may remove, the commissioner of education. The commissioner shall continue to be the chief administrative officer of the department. \* \* \*

#### Article 3, Part II—Motion Picture Division

##### § 120. Motion picture division continued; organization

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

## Appendix.

### § 122. Licenses

The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.

### § 123. Permits

1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

2. Scientific and educational films. Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for

## Appendix.

educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees; provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

### § 125. Permits revocable

Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such director or authorized officer only in the manner provided for license.

### § 126. Fees

The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a fee of three dollars for each one thousand feet or fraction thereof of original film and two dollars for each additional copy thereof licensed or permitted by him. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York.

### § 127. Applications

No license or permit shall be issued for any film unless and until application therefor shall be made in writing in

*Appendix.*

the form, manner and substance prescribed by the education department, and accompanied by the required fee. Such application shall immediately be given a serial number which shall by the producer, owner or applicant be made a permanent part of the principal title portion of the corresponding film and every copy thereof for which the permit or license is applied, in such style and substance as such department shall prescribe.

**§ 128. Licenses and permits void**

Any license or permit issued upon a false or misleading affidavit or application shall be wholly void ab initio. Any change or alteration in a film after license or permit, except the elimination of a part or except upon written direction of the director or authorized officer of such division, shall be a violation of this article and shall also make immediately void the license or permit therefor. A conviction for a crime committed by the exhibition or unlawful possession of any film in the state of New York shall per se revoke any outstanding license or permit for said film and such director or authorized officer shall cause notice thereof to be sent to the applicant or applicants.

**§ 129. Unlawful use or exhibition**

It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

## Appendix.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

### § 131. Penalty

A violation of any provision of part two of this article shall be a misdemeanor.

### § 132. Enforcement; rules and regulations

The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace officer in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations.

### Rules and Regulations for Review and Licensing of Motion Pictures, issued by the Board of Regents of the University of the State of New York

#### MOTION PICTURES

The Motion Picture Commission was originally created by an act of the Legislature known as chapter 715 of the Laws of 1921. This commission functioned until January 1, 1927, when under the provisions of the State Departments Law the activities of this commission were transferred to the State Education Department. A Motion Picture Division was created and the Board of Regents

### Appendix.

was authorized to assign to such Division all the powers, duties and functions of the aforesaid commission. . . . (The University of the State of New York Education Department, Handbook No. 38, Page 3.)

### Regents Rules

§ 237 *Examination of films.* 1 All films to be released within the State of New York on or after January 1, 1927, shall be presented for examination to the Motion Picture Division at such times and places as it may designate. The applicant shall fill out a blank furnished by the Division, which shall contain the name and address of the applicant and be a statement or an affidavit as the Director of the Division may require.

2 The application shall contain a statement of the title of the film, the manufacturer and the exchange handling the film, the number of reels and the total length of the picture, and a statement of the number of duplicates or prints of the film to be used in the State of New York. It shall also contain a brief description of the film, with a classification as to whether it is a comedy or drama, the date of manufacture, the date of release and the names of the leading characters in the film. There shall also be embodied in the application an agreement that the duplicates applied for are exact copies of the original film and that all eliminations or changes directed by the Division will be made before the film is released in the State of New York.

3 Applications for licenses for films in which all or a part thereof is to be exhibited in conjunction with any mechanical device for the reproduction of sound or language, or by the use of persons for the utterance of language,

*Appendix.*

must be accompanied by an exact transcription of such language. When the dialogue used in conjunction with such films is in a foreign language, an exact transcription into English must be submitted with the application.

4 Each application for examination shall be filed with the Division at its office in the city of New York, or elsewhere, if required, at least one week before the date fixed for the release.

5 Each application shall be accompanied by a money order or certified check drawn to the order of the Department, Motion Picture Division, for the amount of the fee required by law to be paid.

6 At the time of making the application for a license or permit, the Division will give to each film, and to each duplicate or print thereof, a serial number which shall be included in the identification matter required to be exhibited with the film as provided by these rules.

7 All banners, posters or other advertising matter used, in connection with the film, when requested by the Director, shall be submitted to the Division for examination,

(Handbook 38, *supra*, p. 12-14.)

§ 242 *Unlawful use or exhibition.* It shall be unlawful to exhibit any film in the State of New York unless there shall be exhibited with the same as required by these rules and regulations the seal and serial number accompanied by the identification words showing the granting of a permit or license, and it shall be unlawful to detach and exhibit a portion of any film for which a license or permit has been granted, without the exhibition of the seal, serial number

*Appendix.*

and words accompanying the same. It shall be unlawful to use any portion of the leader upon a film other than the one for which it was issued.

(Handbook 38, *supra*, p. 21-22.)

**§ 244 License or permit to be refused in certain cases.**  
No motion picture shall be licensed or a permit granted for its exhibition within the State of New York the whole or any part of which is obscene, indecent, immoral, inhuman, sacrilegious, or of such a character that its exhibition would tend to corrupt morals or incite to crime.

(Handbook 38, *supra*, p. 23.)

## STANDARDS OF THE MOTION PICTURE DIVISION

### AS FIXED BY LAW

No motion picture will be licensed or a permit granted for its exhibition within the State of New York, which may be classified, or any part thereof, as *obscene, indecent, immoral, inhuman, sacrilegious, or which is of such a character that its exhibition would tend to corrupt morals or incite to crime.*

(Handbook 38, *supra*, p. 25.)

**LIBRARY**  
**SUPREME COURT, U.S.**

Office - Supreme Court, U. S.

F I L E D

APR 23 1952

E. GRODLEY  
CLERK

**Supreme Court of the United States**

OCTOBER TERM, 1951—No. 522

JOSEPH BURSTYN, INC.,

*Appellant,*

*against*

LEWIS A. WILSON, Commissioner of Education of the  
State of New York, *et al.*

**REPLY BRIEF FOR APPELLANT.**

EPHRAIM S. LONDON,

*Attorney for Appellant,*

150 Broadway,  
New York, N. Y.

CLENDON H. LEE,

MILTON H. SPIERO,

LEONARD P. SIMPSON,

*of counsel.*

# INDEX.

	PAGE
UNSUPPORTED STATEMENTS IN THE APPELLEES' BRIEF.....	1
APPELLANT IS NOT ESTOPPED FROM CHALLENGING THE VALIDITY OF THE FILM CENSORSHIP LAW.....	6

## TABLE OF CASES.

<i>Abie State Bank v. Bryan</i> , 282 U. S. 765.....	7
<i>Ashwander v. Valley Authority</i> , 297 U. S. 288.....	6
<i>Bacardi Corp. v. Domenech</i> , 311 U. S. 150.....	7
<i>Buck v. Kuykendall</i> , 267 U. S. 307.....	7
<i>Burstyn Inc. v. McCaffrey</i> , 198 Misc. 884.....	2
<i>Fahey v. Mallonee</i> , 332 U. S. 245.....	6
<i>Halsey v. New York Soc. of Suppression of Vice</i> , 234 N. Y. 1.....	4
<i>O'Brien v. Wheelock</i> , 184 U. S. 450.....	7
<i>People v. Gotham</i> , 285 N. Y. S. 563.....	4
<i>People v. Larsen</i> , 5 N. Y. S. 2d 55.....	4
<i>People v. Viking Press Inc.</i> , 147 Misc. 813.....	4
<i>Union Pacific R. R. Co. v. Pub. Service Comm.</i> , 248 U. S. 67.....	7
<i>Winters v. New York</i> , 333 U. S. 507.....	5
<i>W. L. Gelling v. State of Texas</i> , U. S. Sup. Ct. October Term, 1951, Docket #707.....	3

## STATUTES AND OTHER AUTHORITIES.

### New York Education Law:

§ 122.....	2
§ 123(2).....	2
§ 125.....	2

### Rules and Regulations for Review and Licensing of Motion Pictures, § 244.....

2

# Supreme Court of the United States

OCTOBER TERM, 1951—No. 522.

JOSEPH BURSTYN, INC.,

Appellant,

*against*

LEWIS A. WILSON, Commissioner of Education of the  
State of New York, *et al.*

## APPELLANT'S REPLY BRIEF.

### Unsupported Statements in the Appellees' Brief.

A reading of the brief submitted by the Appellees (the Regents) might lead one to believe that there "was a rising storm of protest" over the showing of "The Miracle," and that the Regents were inundated with communications all indicating "a strong feeling by the public that the film was sacrilegious" (Appellees' brief pp. 5-6, 51)... The Record does not reveal any strong public feeling that the film was sacrilegious; on the contrary the strong public feeling shown by the record was against the banning of the film (R. 95-141). The communications received by the Regents are not part of the Record. The specific references to their content (Appellees' brief pp. 5, 51) are, therefore, not proper. Moreover, as the counsel for the Appellees stipulated, those "communications were on *both sides* of the question" (R. 86).

Reference is also made in the Appellees' Statement of The Facts to various notices sent by the License Commis-

sioner of the City of New York, and to other occurrences said to be the subject matter of another action, *Burstyn Inc. v. McCaffrey*. Although page 49 of the Record is cited as the page where the facts are reported (Appellees' brief p. 5), they are not reported at that page or at any other page of the Record.

The Regents' statement with respect to the effect of the film censorship statute is not entirely accurate. Their brief, in attempting to minimize the effect of the statute, states, at page 3, "Thus, the only required examination of motion pictures, under the statute, is of those which are to be shown *for entertainment purposes* in public theatres where admission fees are to be charged." (Emphasis supplied.) The statute provides for the issuance of *licenses* only after the films have been examined and approved (Education Law, §122, Appellant's Brief, p. 48). Under the statute *permits* may, in the discretion of the director of the Motion Picture Division, be issued for educational and religious films without prior examination. But the Regulations promulgated by the Regents prevent the exercise of that discretion. Section 244 of the Regents Regulations provides that a permit shall not be granted for any film that does not meet the statutory standards (Appellant's Main Brief p. 54). Obviously a film must be examined before it can be approved as not "obscene, indecent, etc." The statute requires the issuance of a permit without prior examination only for scientific and educational films, shown only to members of the learned professions, and provided the films are not shown in a public or private theater (Education Law §123(2), Appellant's Main Brief p. 48). (Permits granted without examination, even for such limited purposes, may be revoked without a hearing (Education Law, §125, Appellant's Main Brief p. 49.))

It may thus be stated that, under the law as interpreted and enforced by the Regents, *all films shown in public theaters, except news reels, must first be examined and approved by the Motion Picture Division.*

Relying upon their own unpublished files as authority, the Regents declare, at pages 39-40 of their brief, that the representatives of the public support the film censorship law and "the Motion Picture Industry itself has never sponsored or advocated repeal." Those conclusions are entirely unwarranted. It is common knowledge that the Motion Picture Industry is opposed to film licensing statutes. The Motion Picture Association of America (MPAA), representing all the major film producers in the United States, has several times sought an adjudication that film licensing laws are unconstitutional. The MPAA is seeking such a determination from this Court at the present time in *W. L. Gelling v. State of Texas* (October Term, 1951, Docket No. 707). The International Motion Picture Organization is party to the *amicus* brief supporting the Appellant's position in this case and public opinion, as reflected in the newspapers and in radio broadcasts, is opposed to film censorship (R. 109-114).

At page 51 of their brief, Appellees state, "In 'The Miracle' the Virgin is crowned with a dishpan and flowers are flung at her in mock tribute." The Virgin Mary is not portrayed in the film, and none of the characters are in any way identified with her. The picture merely portrays the delusions of a feeble-minded woman who meets and is impregnated by a stranger she believes to be St. Joseph. The Appellees insist that the story is allegorical, that the woman symbolizes the Blessed Virgin, and that the film suggests that Jesus was carnally and not divinely conceived. As the record clearly indicates, that was not the intent of those who produced, directed and acted in the film, nor is

it the interpretation of the great majority of those qualified to judge on religious matters (see pp. 5-7 of Appellant's Main Brief). If the Regents chose to identify the principal character in the film with the Virgin, and to identify her illegitimate child with Jesus, then the "sacrilege" lies in their interpretation and not in the film.

At page 48 of their brief, the Regents quote from the majority opinion of the Court of Appeals of New York dismissing the statements of the many clergymen, professors, educators, editors and writers submitted to the Regents and made part of the Record in this case (R. 95-141), as expressions of "personal opinions . . . of little help to us" (R. 152). It is the usual practice in New York State to submit opinions of qualified persons in censorship cases. *People v. Larsen*, 5 N. Y. S. 2d '55; *People v. Viking Press*, 147 Misc. 813; *People v. Gotham*, 285 N. Y. S. 563. The Court of Appeals followed that practice in *Halsey v. New York Soc. for Suppression of Vice*, 234 N. Y. 1. Moreover, the Regents' intimation that the Exhibits are not worthy of consideration comes with ill grace in view of their ruling against oral testimony, which in effect restricted the Appellant to the submission of such statements (R. 27, 56-57).

Great stress is placed in the Regents' brief (at pp. 20-27) on the fact that production and exhibition of motion pictures are commercial enterprises, and that the producers of pictures emphasize the entertainment aspects. Copies of advertisements in the New York Times are appended to the brief to demonstrate that emphasis. The quality of the advertisements does not, however, affect the nature of the product. The films advertised include Victor Hugo's *Les Misérables*; George Bernard Shaw's *Caesar and Cleopatra*; T. S. Eliot's *Murder in the Cathedral*; *Nature's Half Acre*

(a documentary showing the seasonal changes in animal and plant life on a half acre of ground); *Kon-Tiki* (a documentary account of a voyage on a raft across the Pacific, made to prove the migration of Incas to the South Sea Islands); *Royal Journey* (a documentary account of Princess Elizabeth's Good-Will Tours); *It's A Big Country* (which begins with the spoken words, "This is a message picture. Its message is 'hooray for America.'"); *Passion for Life* (revealing the methods of 'progressive education'); *My Son John* (showing the effect of communism on a family relationship); *Viva Zapata* (a study of the Mexican peasant revolutionary); *Anything Can Happen* (the story of the adventures of an immigrant learning the American way of life); *The Marrying Kind* (an account of the problems of frustration in marriage that lead to the Domestic Relations Court); *Mr. Lord Says No* (a satire on bureaucracy); *For Men Only* (an indictment of hazing in college fraternities); *Rashomon* (an incident as narrated by several different people, demonstrating that each person's understanding of truth is to his own advantage); *Death of a Salesman* (depicting the false worship of material success); *The River* (a semi-documentary of the river Ganges, showing the ceremonies and festivals of the people); *King Solomon's Mines* (which also employs the documentary technique to show animal and tribal life in Africa).

However the films may be sold, it is clear that they report, inform, educate, provoke thought and express ideas. It is absurd to contend that motion pictures are not a medium of communication because they also entertain. As this Court pointed out in *Winters v. New York*, 333 U. S. 507, 510, it is impossible to draw a line between informing and entertaining. Every great dramatist from Aristophanes

to George Bernard Shaw, every great novelist from Cervantes to Huxley, every great satirist from Horace to Beerbohm, has simultaneously informed and entertained.

### **Appellant is not Estopped from Challenging the Validity of the Film Censorship Statute.**

The Regents argue (at p. 64 of their brief) that, since the Distributor-Appellant obtained a license for the exhibition of "The Miracle", it may not challenge the constitutionality of the statute, under which the license was obtained. The license, it will be recalled, was revoked by the Regents on the ground that the grant was illegal and void (R. 54, 162). The constitutional issues were timely raised, and were determined on the merits by the state courts (R. 7, 89, 156).

The doctrine of estoppel rests on the equitable principle that one may not receive and retain the benefits of an Act while attacking its validity. *Fahey v. Mallonee*, 332 U. S. 245, 255. The doctrine cannot be applied here for the challenged statute does not confer a benefit, but limits a right. Moreover, even if the statute did confer a benefit, it cannot be said that the benefit was retained in this case.

The Regents rely on *Ashwander v. Valley Authority*, 297 U. S. 288, and *Fahey v. Mallonee*, 332 U. S. 245, to support their contention that Appellant may not contest the validity of the statute. Neither case is applicable. The determination in *Fahey v. Mallonee*, *supra*, was that an Association (or its members) had no standing to attack the validity of an Act upon which its existence depended. The reference in the Regents' brief to *Ashwander v. Valley Authority*, 297 U. S. 288, 349, is merely to dictum in a concurring opinion. The majority of the court ruled that the plaintiffs in that case were *not* estopped from challenging the validity of a

statute merely because they had relied upon its validity and received certain benefits under the statute in the past. Mr. Chief Justice Hughes, writing for the court, stated (297 U. S. 323): "The principle is invoked that one who accepts the benefit of a statute cannot be heard to question its constitutionality . . . We think that the principle is not applicable here . . ."

The contention that Appellant, because it secured a license for "The Miracle", is estopped from denying the validity of the statute requiring such license, is without merit. The license was rescinded on the ground that its issuance in the first instance was improper. Appellant was thus placed in the position of one who had never received a license for the picture. "One who is willing to obey a statute and invoke its provisions by applying thereunder for a license to do business is quite free, when his application is denied, to enjoin the operation of the statute on the ground that it may not constitutionally require any license at all." *Buck v. Kuykendall*, 267 U. S. 307, 316. See also *O'Brien v. Wheelock*, 184 U. S. 450, 489; *Union Pacific R. R. Co. v. Pub. Service Comm.*, 248 U. S. 67, 69; *Abie State Bank v. Bryan*, 282 U. S. 765, 776; *Bacardi Corp. v. Domenech*, 311 U. S. 150, 166. If the Regents' contention is valid, the Distributor's only means of testing the constitutionality of the statute (it having been in existence many years) would be to ignore its provisions, exhibit the film without license, and risk criminal prosecution.

Even if the license for "The Miracle" had been retained, the Distributor would not be estopped from challenging the constitutionality of the law. *Union Pacific R. R. Co. v. Pub. Service Comm.*, 248 U. S. 67. The *Union Pacific* case involved a statute that prohibited the issuance of mortgage bonds unless a certificate authorizing the issue was obtained

from the Public Service Commission. The plaintiff applied for and secured a certificate, issued its bonds, and then sued to recover the charge made for the certificate on the ground that the statute unlawfully interfered with interstate commerce. The Commission argued that the plaintiff, having voluntarily secured and having made use of the certificate, was precluded from challenging the validity of the law under which it was granted. Mr. Justice Holmes, speaking for the court, said in dismissing that contention (248, U. S. at p. 70), "The certificate was a commercial necessity for the issue of the bonds. The statutes if applicable purported to invalidate the bonds and threatened grave difficulties if the certificate was not obtained. The Railway Company and its officials were not bound to take the risk of these threats being verified. Of course it was in the interest of the Company to get the certificate. It is always for the interest of the party under duress to choose the lesser of two evils."

If, as Appellees now state, the Distributor has no standing to raise the constitutional issues, it is difficult to understand the Appellees' failure to file a statement in opposition to jurisdiction, or to move to dismiss this appeal before probable jurisdiction was noted.

Respectfully submitted,

EPHRAIM S. LONDON,  
Attorney for Appellant,  
150 Broadway,  
New York, N. Y.

CLENDON H. LEE,  
MILTON H. SPIERO,  
LEONARD P. SIMPSON,  
*of Counsel.*

Office - Supreme Court, U. S.

F I L E D

LIBRARY  
SUPREME COURT, U. S.

PR 18 1952

CHARLES E. MCGOWAN

CLERK

# Supreme Court of the United States

October Term, 1951

No. 522

JOSEPH BURSTYN, INC.,

*Appellant,*

vs.

LEWIS A. WILSON, Commissioner of Education of the State of New York, *et al.*,

*Appellees.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## BRIEF FOR APPELLEES

WENDELL P. BROWN  
Solicitor General

RUTH KESSLER TOCH  
Assistant Attorney General  
*Of Counsel*

JOHN P. JEHU

ELIZABETH M. EASTMAN

GEORGE B. FARRINGTON

*Of Counsel*

NATHANIEL L. GOLDSTEIN  
Attorney General of the State  
of New York  
State Capitol  
Albany, New York

CHARLES A. BRIND, JR.  
*Counsel to the Board of Regents  
of the University of the State  
of New York and State Educa-  
tion Department*  
Education Building  
Albany, New York  
*Attorneys for Appellees*

## INDEX.

	PAGE
Statement of the Case .....	1
The Statute .....	2
The Issue .....	3
The Facts .....	4
The Decisions Below .....	8
Summary of Argument .....	11
<b>Argument:</b>	
I. The provisions of the New York law as to the licensing of motion pictures and the circumstances when they shall not be licensed are constitutional under direct precedent. The law offends no right guaranteed by the First Amendment as this Court has interpreted that amendment .....	12
A. Every contention presented by appellant here was considered and rejected by this Court in the <i>Mutual Film</i> cases, 236 U. S. 230; 248 .....	12
The New York law is substantially narrower than the statute sustained in <i>Mutual Film Corp. v. Ohio</i> .....	15
The <i>Mutual</i> case has not been overruled but on the contrary expressly followed .....	16
The rationale of the <i>Mutual</i> opinion is completely valid today .....	18
The Motion Picture Industry—a principal part of the “large-scale business” of “entertainment”. The particular situations this presents and the extent of constitutional protection thereof .....	20
B. The constitutional guaranties of freedom of speech and press do not protect or sanction that for which the New York statute denies a license to motion pictures .....	28

- The motion picture is not the equivalent of communication "by tongue or pen." In the application of the First Amendment, the vehicle of communication is a governing factor ..... 34
- The public policy in New York State as articulated by representatives of the public and by the legislators is that the New York law is necessary ..... 39
- Inherent in the art and mode of exhibition of the motion picture is the potential that is the altogether reasonable basis for some control and that requires the difference in the application of constitutional guaranties ..... 40
- Preventive measures and punishment for abuse of constitutional freedoms are alternative forms of regulation adopted as circumstances indicate. The form of regulation is within the State's discretion ..... 41
- Under the statutes in New York State, particularly the Penal Law, motion pictures are subjected to but one scrutiny. When they are licensed by the Education Department, they may be shown anywhere in this State ..... 43
- There is nothing before this Court which would indicate that its holding in the *Mutual* case was unwise ..... 46
- II. To portray the sacrilegious in a motion picture is not an expression of the exhibitor's freedom of religion under the protection of the Constitution. On the contrary, it is a violation of the public's freedom of religion.
- To decline to license sacrilegious films is within the State's police power. It does not entail any participation in religious affairs.
- The word "sacrilegious" has a well understood meaning and is as precise as a statute is required or could be practically ..... 47

### III.

PAGE

As the exclusion of the obscene is in the State's police power, so is the exclusion of the sacrilegious .....	54
To prevent the burlesque of a religious belief in a motion picture does not "establish" that belief .....	59
The language of the statute is as precise as the law requires that it be and as it can be practically .....	60
III. Appellant is without standing to contest the validity of the statute .....	64
Conclusion .....	66
Appendix A—New York Motion Picture Licensing Law.	68
Appendix B—Motion Picture Advertisements. Bound in at end of Brief.	

### TABLE OF CASES.

Allen-Bradley Local v. Board, 315 U. S. 740.....	45
Anti-Fascist Committee v. McGrath, 341 U. S. 123.....	65
Ashwander v. Tennessee Valley Authority, 297 U. S. 288 .....	64, 65
Associated Press v. United States, 326 U. S. 1 .....	42
Boyce Motor Lines v. United States, 342 U.S. 337..	60, 61, 63
Breard v. Alexandria, 341 U. S. 622.....	22, 23, 36, 38, 67
Building Service Union v. Gazzam, 339 U. S. 532..	36, 37, 38
Burstyn, Inc. v. McCaffrey, 198 Misc. 834, 278 App. Div. 253, 303 N. Y. 242 .....	2, 5, 19, 44, 48, 49, 52, 54, 59, 64
Cantwell v. Connecticut, 310 U. S. 296 .....	49, 50
Carpenters Union v. Ritter's Cafe, 315 U. S. 722..	33, 37, 54
Chaplinsky v. New Hampshire, 315 U. S. 568.....	
.....	29, 33, 38, 42, 49, 50, 62
Church of the Holy Trinity v. United States, 143 U. S. 457 .....	66

## IV.

PAGE

Crowley v. Christensen, 137 U. S. 86 .....	37, 45, 54
Dennis v. United States, 341 U. S. 494 .....	32, 33, 57
Drivers Union v. Meadowmoor Co., 312 U. S. 287.....	33, 36, 37, 54, 57
Eisner v. Macomber, 252 U. S. 189 .....	62
Eureka Productions, Inc. v. Lehman, Governor, <i>et al.</i> , 17 F. Supp. 259 aff'd 304 U. S. 541 .....	17, 54
Fahey v. Mallonee, 332 U. S. 245 .....	64
Fox v. Washington, 236 U. S. 273 .....	41, 45
Frohwerk v. United States, 249 U. S. 204 .....	34
Giboney v. Empire Storage Co., 336 U. S. 490 .....	34, 42
Hannegan v. Esquire, Inc., 327 U. S. 146 .....	29, 66
Hughes v. Superior Court, 339 U. S. 460 .....	35, 36, 42, 56
Irwin v. Gavit, 268 U. S. 161 .....	62
Kovacs v. Cooper, 336 U. S. 77.....	16, 35, 36, 41, 61
Kunz v. New York, 340 U. S. 290 .....	56
Murdock v. Pennsylvania, 319 U. S. 105 .....	22, 23, 48
Mutual Film Corp. v. Hodges, 236 U. S. 248.....	46, 54, 55
Mutual Film Corp. v. Ohio Industrial Comm., 236 U. S. 230 .....	11-20, 46, 54
National Broadcasting Co. v. United States, 319 U. S. 190 .....	35, 62
Near v. Minnesota, 283 U. S. 697 .....	29, 33, 42
Niemotko v. Maryland, 340 U. S. 268.....	45, 56, 57
Noble State Bank v. Haskell, 219 U. S. 104.....	58
Radio Corp. v. United States, 341 U. S. 412.....	40
RD-DR Corporation v. Smith, 183 F. (2d) 562, cert. den. 340 U. S. 853 .....	17
Reynolds v. United States, 98 U. S. 145 .....	58
Robertson v. Baldwin, 165 U. S. 275.....	59

## V.

## PAGE

	PAGE
Rosen v. United States, 161 U. S. 29 . . . . .	28, 62, 63
Schenck v. United States, 249 U. S. 47 . . . . .	42
Sterling v. Constantin, 287 U. S. 378 . . . . .	37
Teamsters Union v. Hanke, 339 U. S. 470 . . . . .	36, 37, 38, 57
Terminiello v. Chicago, 337 U. S. 1 . . . . .	42, 56, 57
Trinity Methodist Church, South v. Federal Radio Commission, 62 F. (2d) 850 cert. den. 284 U. S. 685 . . . . .	28, 57
United States v. Alpers, 338 U. S. 680 . . . . .	28
United States v. Ballard, 322 U. S. 78 . . . . .	49, 62
United States v. Hood, Supreme Court of the United States, March 31, 1952 . . . . .	61, 63
United States v. Paramount Pictures, 334 U. S. 131 . . . . .	20
United States v. Petrillo, 332 U. S. 1 . . . . .	45
United States v. Wurzbach, 280 U. S. 396 . . . . .	63
Updegraph v. Commonwealth, 11 Serg. & R. (Pa.) 394 . . . . .	50
West Coast Hotel Co. v. Parrish, 300 U. S. 379 . . . . .	38, 58
Winters v. New York, 333 U. S. 507 . . . . .	30, 60

## STATUTES CITED.

New York Education Law § 122 . . . . .	2, 7, 15
New York Education Law § 123 . . . . .	52
New York Education Law § 123(1) . . . . .	2, 15
New York Education Law § 123(2) . . . . .	3, 15
New York Education Law § 123(3) . . . . .	3, 15
New York Laws of 1921, c. 715 . . . . .	46
New York Penal Law § 1141 . . . . .	29, 44, 64
18 U.S.C.A. § 1461 . . . . .	28
18 U.S.C.A. § 1462 . . . . .	28
18 U.S.C.A. § 1463 . . . . .	28
18 U.S.C.A. § 1464 . . . . .	28
19 U.S.C.A. § 1305 . . . . .	28
47 U.S.C.A. § 303(D) . . . . .	28

## AUTHORITIES CITED.

	PAGE
The Annals of The American Academy of Political Science, November 1947	
Nelson, Donald M., p. 55 .....	21
Quigley, Martin, pp. 65, 66, 68 .....	21
Ramsaye, Terry, p. 11 .....	21
Watkins, Gordon S., p. vii .....	21
Chafee, <i>Free Speech in the United States</i> ..	30, 34, 43
Chafee, <i>Government and Mass Communications</i> ..	30, 31, 34
Commission on Freedom of the Press, <i>Freedom of the Movies</i> .....	24-27, 32
Cooley, <i>Constitutional Limitations</i> .....	30, 58
Douglas, Mr. Justice	
Excerpt from speech to Associated Friends of Occidental College, February 18, 1949 .....	20
Ernst and Lindey, <i>The Censor Marches On</i> .....	43-44
International Motion Picture Almanac, 1948-9 .....	28
International Motion Picture Almanac, 1951 .....	23
Johnston, Eric	
Excerpt from address October 24, 1950 .....	28
Meiklejohn, Alexander, <i>Free Speech and Its Rela- tion to Government</i> (1948) .....	33
Morley, Christopher	
New York Times Book Review, March 16, 1952 ..	31
Motion Picture Production Code .....	24, 41
Thayer, <i>Legal Control of the Press</i> (1950) ..	30, 62-63

# Supreme Court of the United States

---

October Term, 1951.

---

No. 522

---

JOSEPH BURSTYN, INC.,

*Appellant,*

vs.

LEWIS A. WILSON, Commissioner of Education of the State of New York, and JOHN P. MYERS, WILLIAM J. WALLIN, WILLIAM LELAND THOMPSON, GEORGE HOPKINS BOND, W. KINGSLAND MACY, EDWARD R. EASTMAN, WELLES V. MOOT, CAROLINE WERNER GANNETT, ROGER W. STRAUS, DOMINICK F. MAURILLO, JOHN F. BROSNAN and JACOB L. HOLTZMANN, as Regents of the University of the State of New York,

*Appellees.*

---

APPEAL FROM THE COURT OF APPEALS OF THE STATE  
OF NEW YORK

---

## BRIEF FOR APPELLEES

---

### Statement of the Case

This proceeding was brought under Article 78 of the New York Civil Practice Act to review the determination and order of the appellee, the Board of Regents of the University of the State of New York, rescinding and cancelling the licenses theretofore issued for the exhibition of the motion picture films "The Miracle" and "Ways of Love."

The Appellate Division of the Supreme Court of the State of New York, Third Department, unanimously confirmed the determination of appellees (R. 87). The Court of Appeals affirmed the order of confirmation (two Judges dissenting) (R. 142).

The opinion of the Appellate Division is reported in 278 App. Div. at page 253, and appears at pages 88-94 of the Record.

The prevailing, concurring and dissenting opinions of the Court of Appeals are reported in 303 N. Y. at pages 242, 262 and 264, and appear at pages 144, 158 and 159 of the Record.

### **The Statute**

The statute under attack is Article 3, Part II (§§ 120-132) of the New York Education Law, which is reproduced as Appendix A to this Brief.

Under the statute, all motion pictures to be exhibited within the State, with exceptions hereinafter to be noted, are required to be submitted to the motion picture division of the Education Department, which must issue a license therefor "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime" (§ 122).

*"Current Event" Films.* Specifically excepted from the statute are "all films exclusively portraying current events or pictorial news of the day, commonly called newsreels, or excerpts from the public press", which may be exhibited without inspection and without permits or fees (§ 123, subd. 1).

*Scientific and Educational Films.* Permits for every such motion picture film, intended for use by the learned professions, must be issued without examination, upon the filing by the owner of a description of the film and a statement that it is not to be exhibited at any private or public place of amusement (§ 123, subd. 2).

*Films for Educational, Charitable and Religious Purposes.* Permits for films for these purposes, or for the instruction or welfare of an employer's employees, may be issued by the motion picture division without examination, upon the filing by the owner of a description of the film (§ 123, subd. 3).

Permits, as distinguished from the licenses, may be revoked five days after a notice in writing to the applicant, in which event the film may be submitted in the manner provided for licenses (§ 125).

Thus, the only required examination of motion pictures, under the statute, is of those which are to be shown for entertainment purposes in public theatres where admission fees are to be charged.

The determination of the Board of Regents, in respect to the denial of a license, must be based upon evidence sufficient to satisfy a reasonable need, must not be arbitrary or capricious, and is subject at all times to review by the courts under Article 78 of the State's Civil Practice Act.

### The Issue

Succinctly stated the questions attempted to be raised by appellant's specifications of error are:

1. Is "The Miracle" sacrilegious?
2. Does the statute impose a constitutional restraint on freedom of expression and communication?

3. Is the statute so vague as to deprive appellant of property without due process of law?
4. Does the statute violate the constitutional guaranty of separation of church and state or prevent the free exercise of religion?

Upon the first question, it is thought that this court will accept the finding of the Board of Regents and of the state courts that the picture is in fact sacrilegious.

Underlying the questions which appellant seeks to raise are the primary points that appellant may not be heard to question the validity of the statute, since (1) it has sought and obtained benefits under it and (2) there was no prior restraint as to appellant and the showing of "The Miracle."

### **The Facts**

On March 2, 1949, the motion picture division of the State Education Department issued a license to Lopert Films, Inc., for a motion picture with Italian dialogue entitled "Il Miracolo" (R. 27). To the knowledge of appellees, this picture was never exhibited pursuant to this license. On November 30, 1950, the motion picture division of the State Education Department issued a license to appellant, Joseph Burstyn, Inc., for a motion picture film trilogy entitled "Ways of Love", which said trilogy included the motion picture entitled "The Miracle" (R. 27). The reviews in both instances were made in the usual routine by certain of the reviewers.

Closely following the initial exhibition of the picture "Ways of Love", the Education Department of the State of New York and the Board of Regents of the University of the State of New York were in receipt of many com-

munications concerning the public exhibition of "The Miracle" (R. 48, 86). These communications indicated that there was a strong feeling by the public that the film was sacrilegious (R. 48, 86). Soon thereafter the Commissioner of Licenses of the City of New York notified the Paris Theater Corporation, where the motion picture was being exhibited, that if the theater continued to exhibit "The Miracle", steps would be taken in regard to its theater license (R. 49). The Commissioner gave further notice to Joseph Burstyn, Inc., the distributor of "The Miracle", that similar action would be taken in regard to any other theater which exhibited the film. Upon the continued exhibition of the film, the Commissioner suspended the license of the Paris Theater Corporation. The Commissioner stated that he took this action because he found the picture to be "a blasphemous affront to a great many of the citizens of our city" (*Burstyn v. McCaffrey*, 198 Misc. 884, 885). Thereupon the appellant herein commenced an action seeking to enjoin the Commissioner of Licenses from taking such action and attacked the authority of the Commissioner to do so. The Supreme Court of the State of New York, at a Special Term held in and for the County of New York, granted the injunction prayed for by petitioner in that action, (the appellant here) upon the ground that the right to determine whether a motion picture is sacrilegious "is vested solely and exclusively in the Education Department of the State. \* \* \* This power negatives the existence of co-equal powers in any municipal officer \* \* \*". The Justice further stated " \* \* \* Any individual can seek to have the Board of Regents revoke its permit \* \* \*". (*Burstyn v. McCaffrey*, *supra*).

Meantime various organizations maintained picket lines outside of the Paris Theater where "The Miracle" was

being exhibited (R. 49), and the Chancellor of the Board of Regents, recognizing that the public exhibition of "The Miracle" had become a matter of public controversy, placed the matter on the agenda of the January 1951 meeting of the Board (R. 25), and requested three members of the Board to view the film in question and be in a position to give their colleagues upon the Board their views. This committee viewed the film, described the picture to the entire Board of Regents, and stated that in their unanimous judgment "The Miracle" was sacrilegious (R. 26).

In view of the rising storm of protest and the report of this committee, the Board of Regents thereupon directed that the holders of the licenses be required to show cause on the 30th day of January, 1951, at the Association of the Bar, in the City of New York, why the licenses should not be rescinded and cancelled on the ground that the picture is sacrilegious (R. 27).

In addition to the licensees, opportunity was afforded to any organizations or persons, who cared to do so, to submit briefs, and many took this opportunity to file letters and briefs with the Board of Regents setting forth their views on the matter (R. 26).

Lopert Films, Inc., the holder of the first license, did not appear at the hearing but later telegraphed that it had assigned its interests in "The Miracle" (R. 49).

Joseph Burstyn, Inc., the holder of the later license for "Ways of Love", which included "The Miracle", appeared specially at the hearing and challenged the jurisdiction of the Board of Regents and of the committee, alleging that they had no power or authority to proceed. No attempt was made to meet the merits of the controversy, and af-

ter stating their grounds for challenging the jurisdiction, appellant withdrew from further participation in the hearing (R. 30, 39 *et seq.*, 49).

Counsel for Joseph Burstyn individually, who, it is alleged, is the sole stockholder of Joseph Burstyn, Inc., the appellant herein, submitted a long affidavit and voluminous exhibits in an attempt to sustain his contention that any action on the part of the Board of Regents with respect to the license for the motion picture film "The Miracle" was unauthorized by law and "an unauthorized restriction of the right of free expression and communication" (R. 42).

The greatest portion of the briefs submitted at the hearing by other organizations and persons urged that the licenses be revoked. The others confined their arguments to the desirability of censorship of motion picture films, the validity or desirability of the standards of exclusion set forth in the law, and some challenged the constitutionality of the statute involved (R. 50).

The committee, in its report dated February 15, 1951, recommended that the members of the Board of Regents, as a committee of the whole, view the motion picture in question (R. 54).

On February 15, 1951, the Board of Regents, as a committee of the whole, at a private showing, viewed the film. At its regular meeting the following day, the Board of Regents considered the report of the committee, the affidavits, briefs, and other documents, and after full discussion and due deliberation, unanimously found that "The Miracle" was sacrilegious and not entitled to be licensed under the provisions of Section 122 of the Education Law. It was voted that the license issued to Lopert

Films, Inc., on March 1, 1949, for "Il Miracolo", and the license issued to Joseph Burstyn, Inc., for the trilogy "Ways of Love", which included "The Miracle", be cancelled and rescinded. It was further voted that upon application to the Motion Picture Division a license would be granted for so much of the trilogy "Ways of Love" as did not include "The Miracle" (R. 54-56). Thereafter, and on the same day, this proceeding was commenced (R. 1-2).

### The Decisions Below

#### Of the Court of Appeals

The Court of Appeals, construing the statute and after its members had viewed the picture, reached the following conclusions:

1. That the meaning of the word "sacrilegious" is clear and provides a sufficiently definite standard (R. 151),
2. That the picture not only encroaches upon the sacred relationship of Christ, His Mother, Mary, and Joseph, and the Biblical presentation thereof in respect to the birth of Christ, but utterly destroys it, associating it, as the Regents found, "with drunkenness, seduction, mockery and lewdness", and in the language of the script itself, "with passionate attachment, sexual passion and gratification", as a way of love (R. 153),
3. That the statute does not violate the provisions of the First Amendment relating to religious freedom (R. 156) because religious presentations, as well as educational and scientific films, are exempt from licensure and no one is prevented by the statute from propagating his own religious views by means of motion pictures (R. 154); because the Regents are not required to form religious judgments in order to

determine whether a film is sacrilegious, the standard applied being that no religion shall be treated with contempt, mockery, scorn and ridicule by those engaged in selling entertainment by way of motion pictures; because the statute is directed to the promotion of the public welfare, morals, peace and order and the fact that some benefit may incidentally accrue to religion is not sufficient to render the statute unconstitutional (R. 155). It said that the denial of the right of the government to interfere to protect religious beliefs from private or commercial attacks or persecution is a denial of its power to keep peace and of the right of the free exercise of religion (R. 155).

On the subject of freedom of expression, the Court held that, since the licensee here sought and obtained benefits under the statute and seeks to retain the license granted, it may not argue that the statute is unconstitutional *in toto* as a prior restraint on the right of free speech, but nevertheless disposing of the argument on the merits, held that motion pictures are primarily a form of entertainment and not in the same category as the press as vehicles of thought (R. 156).

Excerpts from the Court's opinion will be set forth under the appropriate point headings *infra*.

#### **Of the Appellate Division**

The five justices of the Appellate Division had also viewed the picture. The presiding justice, writing for the unanimous Court, described the film in the following language (R. 88):

"The picture, produced in Italy, depicts a demented peasant girl tending a herd of goats on mountainside.

A bearded stranger appears, garbed in a dress reminiscent of Biblical times. She imagines him to be St. Joseph, and that he has come to take her to heaven. While she babbles about this he says nothing, but plies her with wine, and the implication is left that he seduces her. Later, when her pregnancy becomes known to the villagers, they mock her and place a basin on her head in imitation of a halo. She exclaims at one point as to her pregnancy, 'It's the grace of God.' She leaves the village to take refuge in a cave, and finally gives birth to a child in the basement of a church which stands on a high hill.

"According to the English dialogue, in her babbling to the bearded stranger, she makes these statements: 'I'm not well . . . And taking a loaf of bread, he broke it . . . And an Angel of the Lord appeared in his dream and said . . . Joseph, . . . Son of David . . . Have no fear to take Mary as your bride . . . for what has been conceived here . . . St. Joseph . . . Cast aside my body and my soul . . . I'd feel so happy without this weight . . . St. Joseph has come to me . . . What Heaven . . . Heaven on earth . . . The mad woman has received grace.'"

After defining the term "sacrilege" as having the modern meaning of "the violation or profanation of sacred things" and stating that the Legislature obviously used the term in its widest sense as applied to all recognized religions (R. 90-91), the Court concluded (R. 91-92):

"A view of the picture in question would convince any reasonable mind that it was conceived and produced purely as an entertainment spectacle, and not as a vehicle for inquiry or discussion as to the merits of any religious dogma. The statute does not muzzle either free speech or a free press. All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom. It should be added in connection with this point that news films, scientific and educational films, are expressly exempted from censorship."

## Summary of Argument

- I. The licensing statute imposes no unconstitutional restraint on freedom of expression or communication. This Court so held in the *Mutual Film* cases (236 U. S. 230, 248). The authority of those cases has in no way been impaired, but on the contrary their rationale has been followed in numerous decisions of this and other courts.
- II. The New York statute is more narrowly drawn than the statutes held constitutional in the *Mutual Film* cases in that it expressly exempts current event films from its provisions and provides for the issuance of permits for films intended solely for educational, charitable, religious and similar purposes without inspection.
- III. The production and exhibition of the entertainment type of motion pictures is big business—show business—as the industry itself recognizes. The need for regulation is, if anything, greater today than at the time of the decisions in the *Mutual Film* cases. The constitutional guarantees of the First Amendment are not applicable to them in precisely the same way as to speech and the press.
- IV. Preventive measures, as distinguished from punishment for abuse of constitutional freedoms, is the only effective way of dealing with motion pictures, but in the instant case there has been no previous restraint or prior censorship.
- V. The constitutional guaranty of freedom of religion does not embrace the right to lampoon and vilify all religion or any religion. The proscription of motion pictures of that sort does not entail participation in religious affairs, and is well within the State's police power to promote the public welfare, morals, public peace and order. Gratuitous

insult to recognize religious beliefs by means of commercial pictures is not only offensive to decency and morals, but constitutes in itself an infringement of the freedom of others to worship and believe as they choose.

VI. The term "sacrilegious" is not vague or indefinite. The Court of Appeals construed it as "the act of violating or profaning anything sacred". That is its meaning in ordinary speech.

VII. Appellant, having accepted benefits under the statute, and there having been no prior restraint in this case, is without standing to contest the validity of the statute.

## I

**The provisions of the New York law as to the licensing of motion pictures and the circumstances when they shall not be licensed are constitutional under direct precedent. The law offends no right guaranteed by the First Amendment as this Court has interpreted that amendment.**

## A

**EVERY CONTENTION PRESENTED BY APPELLANT HERE WAS CONSIDERED AND REJECTED BY THIS COURT IN THE MUTUAL FILM CASES, 236 U. S. 230; 248.**

The arguments in opposition to the statute in the *Mutual* case were very like the arguments appellant is making here (Br., p. 10), viz.: that motion pictures express ideas and opinions and are educational, and therefore are to be accorded freedom of speech and press in precisely the same way as a speech or newspaper article.

The Court's answer in the *Mutual* case to those arguments, answers the similar arguments here. Said the Court (pp. 241-242):

"We may concede the praise [of the useful purposes of movies]. \* \* \* No exhibition, therefore, or 'campaign' of complainant will be prevented if its pictures have those qualities. Therefore, however missionary of opinion films are or may become, however educational or entertaining, there is no impediment to their value or effect in the Ohio statute."

But, said the Court,

"\* \* \* they may be used for evil, and against that possibility the statute was enacted. Their power of amusement and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences. And not only the State of Ohio but other States have considered it to be in the interest of the public morals and welfare to supervise moving picture exhibitions. We would have to shut our eyes to the facts of the world to regard the precaution unreasonable or the legislation to effect it a mere wanton interference with personal liberty."

As in the present case (Br., p. 10), the argument was made in the *Mutual* case for subsequent responsibility for abuse rather than prior licensing (236 U. S. at p. 242).

The Court's reply to that argument was that while motion pictures "may be mediums of thought," they were not the same thing as the speech and writing to which the First Amendment guarantees apply and therefore not similarly protected (pp. 243-244). Said the Court:

"We immediately feel that the argument is wrong or strained which extends the guarantees of free opinion and speech to the multitudinous shows which are

advertised on the bill-boards of our cities and towns and which regards them as emblems of public safety, to use the words of Lord Camden, quoted by counsel, and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.

"The judicial sense supporting the common sense of the country is against the contention."

Moreover, the Court added (pp. 244-245):

"It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability and power, and it may be in experience of them, that induced the State of Ohio, in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal Code, to require censorship before exhibition, as it does by the act under review. We cannot regard this as beyond the power of government."

Upon these principles was the constitutionality of the Ohio law upheld in the *Mutual* case. This Court has renounced each one of these principles in recent years in decisions cited *post*. Neither the case itself, therefore, nor its rationale has been abandoned or its authority diminished.

Appellant suggests (Br., p. 26), as a ground for considering the *Mutual* case as impaired in validity today, that in 1915 First Amendment guarantees were not considered as applicable to the states. Whether or not that is so is of no moment insofar as the *Mutual* case is concerned, for

freedom of speech and publication were guaranteed by the Ohio Constitution (236 U. S. at p. 241), and the validity of the statute was tested by the Court on the basis of whether it violated those guarantees (*id.*).

**The New York law is substantially narrower than  
the statute sustained in Mutual Film Corp. v. Ohio.**

The Ohio statute upheld in the *Mutual* case (*supra*), 236 U. S. 230 provided (as quoted and described at page 240 of the opinion) :

"Section 4. 'Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board.' The films are required to be stamped or designated in a proper manner."

The New York statute here under consideration does not cover current event films (which may be exhibited without inspection, permit or fees [Education Law § 123(1), quoted in full in Appendix]), or scientific and educational films, and films intended solely for educational, charitable or religious purposes, or to be exhibited by any employer for the instruction or welfare of his employees (Education Law § 123 [2 and 3], quoted in full in Appendix). For the last a permit is to be issued without inspection upon the filing of an application which shall include a description of the film. Permits for scientific and educational films are to be issued upon filing of a description and a statement that they are not to be exhibited at any private or public place of amusement.

Moreover, the New York statute (Education Law § 122) specifically limits the power of refusal of licensure to certain categories of objectional films, to those which are

"obscene, indecent, immoral, inhuman, sacrilegious, or \*\*\* of such a character that \*\*\* exhibition would tend to corrupt morals or incite to crime."

"Unless" a film falls into these categories, the film *must* be licensed as a matter of law.

The determination that a film falls into any of the proscribed categories is fully subject to review, first within the Department of Education and thereafter in the Courts. This litigation has been such a review.

It is submitted that if the Ohio statute which gave much broader powers to the Board was declared to be fully within the Constitution, that the decisions of this Court in the *Mutual* case apply with much greater force to the New York statute, which fully safeguards the rights of the industry and gives full rein to those films which are not shown for amusement at a profit but for scientific, religious or educational purposes, i. e., as media of thought and opinion, as well as to those which are comparable to the press—current event films.

**The Mutual case has not been overruled  
but on the contrary expressly followed.**

Appellant recognizes that the *Mutual* case\* forecloses any contention that the New York statute is unconstitutional. Therefore, it argues that the decision has "in effect" been overruled (Br., pp. 10, 25).

On the contrary. In 1949, Mr. Justice Frankfurter in *Kovacs v. Cooper* said as directly as could be said (336 U. S. 77, 96):

"movies have been constitutionally regulated," citing for that declaration the *Mutual* case.

---

\* The decision was unanimous. Mr. Justice Holmes was a member of that Court.

In October 1950 (340 U. S. 853), the present membership of this Court denied certiorari in *RD-DR Corporation v. Smith* (Mr. Justice Douglas not being in agreement with that denial). The primary argument that had been made in the United States Court of Appeals, in support of the Atlanta ordinance involved in that case, was the *Mutual* case, and the Court of Appeals (183 F. (2d) 562) based its decision thereon, saying (p. 565):

"The decision has been on the books for years, not only unchanged but uncriticized. . . . Since its writing, it has been quoted from and followed without varying in decisions without number."

In 1938, this Court rendered the following *per curiam* opinion in *Eureka Productions, Inc. v. Lehman, Governor, et al.*, 304 U. S. 541:

"The motion of the appellees to affirm is granted and the judgment is affirmed. *Mutual Film Corp. v. Ohio Industrial Comm'n*, 236 U. S. 230, 240, 241; *Mutual Film Corp. v. Kansas*, 236 U. S. 248, 258."

A three-judge Federal District court had upheld New York's denial—under the statute here involved—of a license for the motion picture "Ecstasy" (17 F. Supp. 259).

There would be no purpose in reproducing here the columns of cases from Shepards' Citations in which the *Mutual* case has been cited. They attest to the fact that it has not in any sense been overruled but has continued to stand as authority, and the proposition it established has continued to be regarded as firmly established; that this Court, the highest courts of many of the states, the federal courts below the level of this Court, have, beginning with the *Mutual* case and steadily and consistently following that case, completely disposed of the issue appellant is raising here, and appellant places its hope now in this Court re-

versing itself and the long line of decisions of other state and federal courts, in order that it might agree with appellant's contentions.

**The rationale of the Mutual opinion is completely valid today.**

Appellant (Br. p. 26) says that the basis of the *Mutual* decision no longer has merit; that motion pictures were stated in the *Mutual* case not to be instruments for the publication of ideas "because they were 'a business pure and simple' mere spectacles intended primarily for entertainment."

What the Court said precisely was (p. 244):

"It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion."

No part of this has suffered in the decisions appellant cites at pp. 26-28 of the brief. It is entirely true today, reaffirmed in decisions of this Court cited *infra*.

Every human utterance, vocal or physical, is the expression of a thought or idea. It is true of a musical composition, of a ballet and of pantomime. But that does not make these the equivalent of speech or press so as to be entitled to the First Amendment guaranties in the same way (cases *infra*). Nor are movies, although they too express ideas. The New York law here before the Court does not give any power over the "ideas" that movies express (statute set forth *supra*). It is only over the *manner* in which any ideas are expressed in an entertainment film if the manner is

Obscene

Indecent

Immoral

Inhuman  
Sacrilegious, or  
Would tend to corrupt morals  
or incite to crime.

Appellant's brief (p. 13) lists a number of recent or current motion pictures dealing with social and political problems. Bearing out that the New York law does not seek to assert any power over the "ideas" in motion pictures is the fact that every one of these was licensed and shown in New York without any question.

It is not a question, therefore, of whether entertainment is entitled to protection of constitutional guaranties. It is the entertainment feature of movies that presents the possibility of there entering into a movie the obscene, indecent, sacrilegious, and it is that to which the New York law is directed.

Appellant argues that the improvement in motion picture technique and, as it believes, in subject matter eliminates the potential which the Court in the *Mutual* case recognized. Appellant neglects to recall that the Court in the *Mutual* case also recognized the presence of value in motion pictures. Appellant treats the word "spectacle" used in the *Mutual* opinion as referring to something crude. It is more probable that the Court employed the word "spectacle" to mean something exhibited for entertainment, in fact, impressive entertainment. In any event, the Court of Appeals opinion very aptly replied to appellant's argument as to the effect of the advance in motion picture technique. Judge Froessel's opinion (R. 157; 303 N. Y. 261-262) noted that the development was foreseen in the *Mutual* cases (referring to p. 242 of that opinion) and added:

"It should be emphasized, however, that technical developments which increase the force of impact of motion pictures simply render the problem more acute. . . . it is precisely that [greater] ability [of transmission] which multiplies the dangers already inherent in the particular form of expression."

"The constitutional concepts of freedom of speech and press" (Br., p. 26) expressed in other fields by this Court in recent years do not diverge from the principles of the *Mutual* decision (*infra*, "B" of this point). Appellant relies upon the statement of Mr. Justice Douglas in *United States v. Paramount Pictures*, 334 U. S. 131, 166, that motion pictures are included in the press whose freedom is guaranteed by the First Amendment. Appellant (Br., p. 12) says frankly that this statement is dictum, which indeed Mr. Justice Douglas said it was (334 U. S. at p. 166). Necessarily, therefore, there was no analysis in the opinion to what extent that protection would be carried. It is not carried to that which makes a motion picture ineligible for license in New York. Not in any medium (*infra*, "B" of this point).

In fact, Mr. Justice Douglas in an address in Los Angeles on February 18, 1949, before the Associated Friends of Occidental College, said:

"We can let man express himself in art and the letters. He is restricted only by the laws of libel and obscenity." (emphasis supplied)

**The Motion Picture Industry—a principal part of the "large-scale business" of entertainment. The particular situations this presents and the extent of constitutional protection thereof.**

The motion picture industry hardly regards itself as an educational institution. It is in show business. For profit. Today as in 1915.

In a foreword to the November 1947 issue of "The Annals of The American Academy of Political and Social Science," devoted to "The Motion Picture Industry," Gordon S. Watkins, editor of The Annals, pointed out (p. vii):

"In modern civilized societies the provision of entertainment has become a large-scale business. In that business the motion picture industry plays a principal role, since \*\*\* its primary function is to furnish entertainment."

In an article in that issue on "The Rise and Place of the Motion Picture," Terry Ramsaye,\* editor of Motion Picture Herald, and otherwise engaged in production and promotions in the motion picture industry, wrote (p. 11):

"Its [motion picture] costs are such that it can be generally supported only by the massed buying power of majorities. \*\*\* The people who pay for the pictures want to see them as emotional experience, not as subjects of study."

Again in the same issue of The Annals (p. 55), Donald M. Nelson, president of the Society of Independent Motion Picture Producers, said:

"Now that the American people are paying over a billion dollars a year to live vicariously in the make-believe world of the cinema, there can be no doubt that 'there's no business like show business' to either Wall Street or Main Street."

Martin Quigley, publisher and editor of motion picture publications and lecturer on social and industrial aspects of motion pictures, said in the same issue of The Annals (pp. 65, 66, 68):

"The primary and substantially exclusive purpose of the entertainment motion picture is to entertain."

---

\* Appellant cites Mr. Ramsaye, brief p. 28.

"As an entertainment medium the motion picture is not a natural inheritor of academic responsibility. To assume that it is burdened with such responsibilities is both illogical and dangerous. \* \* \*

\* \* \* there are many millions of people in this country and elsewhere throughout the world who earnestly hope that motion pictures will never cease to provide, in the midst of the current conditions of stress, uncertainty, and disillusionment, the recreation, relaxation, and escape which are their popular characteristics."

This is the movies as the industry itself sees it. It is entertainment and it is business, big business. That the motion picture industry is a business is of utmost relevance in determining the extent of First Amendment protection. In *Breard v. Alexandria*, 341 U. S. 622 (1951), the constitutionality of an ordinance forbidding door-to-door solicitation of orders for the sale of goods was upheld against an attack that it violated freedom of speech, of the press and due process. Breard was arrested while making door-to-door solicitation of subscriptions for nationally known magazines. As to the contention that the ordinance was an abridgment of freedom of speech and the press, Mr. Justice Reed's opinion said (pp. 641-642):

"Only the press or oral advocates of ideas could urge this point. It was not open to the solicitors for gadgets or brushes. \* \* \* Thus the argument is \* \* \* that the distribution of periodicals through door-to-door canvassing is entitled to First Amendment protection. This kind of distribution is said to be protected because the mere fact that money is made out of the distribution does not bar the publications from First Amendment protection. We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment. The selling, however, brings into the transaction a commercial feature."

In *Murdock v. Pennsylvania*, 319 U. S. 105, a case which involved the distribution of religious literature for which

a nominal price was charged, although the tracts were donated in instances, Mr. Justice Douglas pointed out that "the distinction" between a religious and purely commercial activity is at times "vital" (p. 110), referring to the curbing of distribution of leaflets which were "purely commercial" even though they had a civic appeal or "a moral platitude appended" (p. 111). "The constitutional rights," said Mr. Justice Douglas (p. 111) of those spreading their religious beliefs through the spoken and printed word "are not to be gauged by standards governing retailers or wholesalers of books." On the record in that case, said Mr. Justice Douglas, "it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture" (p. 111).

He called it "a distortion of the facts" to describe their activities as the "occupation of selling books and pamphlets."

It would be exactly the same "distortion of the facts" to regard the production and exhibition of the entertainment motion picture as educational activity rather than "commercial." The motion picture industry is a purely commercial venture, notwithstanding any civic or social ideas that some motion pictures may contain (cf. *Murdock v. Pennsylvania*, *supra*, 319 U. S. at p. 111). And that it is primarily a commercial venture does, as this Court has held so recently as the *Breard* case and in the *Murdock* case, make a very decided difference.

There is some three billion dollars invested in the United States film industry. That investment must attract a lot of business to realize a profit. And it does. Some 60,000,000\* admissions a week, of people seeking entertain-

---

\* Statistics are for the year 1950 from *International Motion Picture Almanac*, 1951.

ment. That is what, as we have seen, the industry feels it is its job to furnish. The maker of each picture in this highly competitive business, with so much at stake, seeks to attract as much as possible of those millions of weekly admissions to its own picture. Even the names of the pictures are chosen with the purpose of conveying the anticipation of an entertaining content, rather than a social message. The motion picture advertisement heralds the entertainment to be derived in one form of escapism or another. For motion pictures dealing with social and political problems, the advertisement, too, refers rarely if ever to those features of the picture, but to its entertainment aspects. To demonstrate, there is attached, as Appendix B of this Brief, reproductions of two pages of The New York Times—labeled “Amusements”—on which appear the motion picture advertisements for New York City as this brief is being written (April 3, 1952).

To make entertaining pictures the producer is ever in search for the novel, the spectacular, the sensational, the different. He will employ comedy, mimicry, mockery, exaggeration. In most cases he will refrain from the obscene, lewd, indecent or sacrilegious, but the potential of possible evil is there.

The motion picture industry itself recognizes this potential and the need for some regulation or control.\* Its own Production Code (reproduced in full in “Freedom of the Movies,” report by The Commission on Freedom of the Press) declares in part as follows (emphasis as it appears in the Code):

“Motion picture producers recognize the high trust and confidence which have been placed in them by the people of the world and which have made motion pictures a universal form of entertainment.

\* As in fact appellant does, e. g., Br. pp. 10, 21, 36.

"They recognize their responsibility to the public because of this trust and because entertainment and art are important influences in the life of a nation.

"Hence, though regarding motion pictures primarily as entertainment without any explicit purpose of teaching or propaganda, they know that the motion picture within its own field of entertainment may be directly responsible for spiritual or moral progress, for higher types of social life, and for much correct thinking." (p. 205)

#### **"REASONS SUPPORTING PREAMBLE OF CODE"**

"1. Theatrical motion pictures, that is, pictures intended for the theatre as distinct from pictures intended for churches, schools, lecture halls, educational movements, social reform movements, etc., are primarily to be regarded as ENTERTAINMENT.

"Mankind \*\*\* has always recognized that entertainment can be of a character either HELPFUL OR HARMFUL to the human race, \*\*\*.

"Hence the MORAL IMPORTANCE of entertainment is something which has been universally recognized. It enters intimately into the lives of men and women and affects them closely; it occupies their minds and affections during leisure hours; and ultimately touches the whole of their lives. A man may be judged by his standard of entertainment as easily as by the standard of his work.

*So correct entertainment raises the whole standard of a nation.*

*Wrong entertainment lowers the whole living conditions and moral ideals of a race.*\*\*\*

"2. Motion pictures are very important as ART. \*\*\*

"Here, as in entertainment,

*Art enters intimately into the lives of human beings.*\*\*\*

*Art can be morally evil in its effects. This is the case clearly enough with unclean art, indecent books, suggestive drama. The effect on the lives of men and women is obvious.*\*\*\*

*In the case of the motion pictures, this effect may be particularly emphasized because no art has*

so quick and so widespread an appeal to the masses. It has become in an incredibly short period *the art of the multitudes.* \*\*\*

- "A. Most arts appeal to the mature. This art appeals at once *to every class*, mature, immature, developed, undeveloped, law abiding, criminal. \*\*\* This art of the motion picture, combining as it does the two fundamental appeals of looking at a *picture* and *listening to a story*, at once reaches every class of society.
- "B. By reason of the mobility of a film and the ease of picture distribution, and because of the possibility of duplicating positives in large quantities, this art *reaches places unpenetrated by other forms of art.* \*\*\*
- "C. D. The latitude given to film material cannot, in consequence, be as wide as the latitude given to *book material*. In addition:
  - a) A book describes; a film vividly presents. One presents on a cold page; the other by apparently living people.
  - b) A book reaches the mind through words merely; a film reaches the eyes and ears through the reproduction of actual events.
  - c) The reaction of a reader to a book depends largely on the keenness of the reader's imagination; the reaction to a film depends on the vividness of presentation. Hence many things which might be described or suggested in a book could not possibly be presented in a film.
- E. This is also true when comparing the film with the newspaper.
  - a) Newspapers present by description, films by actual presentation.
  - b) Newspapers are after the fact and present things as having taken place; the film gives the events in the process of enactment and with apparent reality of life.

"F. Everything possible in a *play* is not possible in a film:

- a) Because of the *larger audience of the film*, and its consequential mixed character. Psychologically, the larger the audience, the lower the moral mass resistance to suggestion.
- b) Because through light, enlargement of character, presentation, scenic emphasis, etc., the screen story is *brought closer* to the audience than the play.
- c) The enthusiasm for and interest in the film *actors* and *actresses*, developed beyond anything of the sort in history, makes the audience largely sympathetic toward the characters they portray and the stories in which they figure. Hence the audience is more ready to confuse actor and actress and the characters they portray, and it is most receptive of the emotions and ideals presented by their favorite stars.

"G. *Small communities*, remote from sophistication and from the hardening process which often takes place in the ethical and moral standards of groups in larger cities, are easily and readily reached by any sort of film.

"H. The *grandeur* of mass settings, large action, spectacular features, etc., affects and arouses more intensely the emotional side of the audience.

"In general, the mobility, popularity, accessibility, emotional appeal, vividness, straightforward presentation of fact in the film make for more intimate contact with a larger audience and for greater emotional appeal" (pp. 212, 213, 214, 215).

## B

**THE CONSTITUTIONAL GUARANTIES OF FREEDOM OF SPEECH AND PRESS DO NOT PROTECT OR SANCTION THAT FOR WHICH THE NEW YORK STATUTE DENIES A LICENSE TO MOTION PICTURES.**

In the next point will be discussed the denial of a license on the ground that the picture is sacrilegious, the ground upon which the license for "The Miracle" was revoked. The instant point deals with the First Amendment guarantees in respect to the other grounds for denial of motion picture licenses in New York.

Laws outlawing the obscene, lewd and indecent are commonplace.

The obscene, lewd or indecent may not be sent through the mails in book, pamphlet, picture, *motion picture film*, paper, writing or print, phonograph recording or electrical transcription (18 U. S. C. A. § 1462, 1461, 1463; *United States v. Alpers*, 338 U. S. 680; *Rosen v. United States*, 161 U. S. 29).

They may not be spoken on radio (18 U. S. C. A. § 1464; 47 U. S. C. A. § 303 [D]; *Trinity Methodist Church, South v. Federal Radio Comm.*, 62 F. (2d) 850, cert. den. 284 U. S. 685).

Obscene films, books, pictures, etc. may not be imported into the United States under federal law (19 U. S. C. A. § 1305; 18 U. S. C. A. § 1462). In addition to New York State, there are at least six state laws and some 200 local laws and ordinances designed to prevent the showing of obscene and indecent motion pictures.\*

\* Eric Johnston, President of the Motion Picture Association of America, in an address October 21, 1950, referred to in D. George Washington Law Review at p. 312; International Motion Picture Almanac, 1948-9, p. 735. Both of these authorities have given the figures as 200 cities or more, not 50 as appellant says (Br. p. 20).

There are federal and state laws, local laws and ordinances in various fields imposing restraint upon public exhibition or dissemination of the obscene and indecent, e. g. New York Penal Law § 1141, *infra*.

Mr. Justice Murphy in *Chaplinsky v. New Hampshire*, 315 U. S. 568; a unanimous opinion, among the concurring Justices being Mr. Justice Black, Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Jackson, said (pp. 571-572) :

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.* 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell v. Connecticut*, 310 U. S. 296, 309-310" (emphasis supplied).

Earlier, in *Near v. Minnesota*, 283 U. S. 697, Mr. Justice Hughes said (p. 716) :

"The primary requirements of decency may be enforced against obscene publications."

In *Hannegan v. Esquire, Inc.*, 327 U. S. 146, Mr. Justice Douglas said (p. 158) :

"The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted."

In *Winters v. New York*, 333 U. S. 507, Mr. Justice Reed said (p. 510) that magazines, although "entitled to the protection of free speech" "are equally subject to control if they are lewd, indecent, obscene or profane."

As the authoritative Cooley on *Constitutional Limitations* stated the rule (p. 886):

"The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense . . . ."

So Professor Frank Thayer in the 1950 edition of his "Legal Control of the Press" states the law to be (p. 277):

"When licentiousness begins freedom of the press ends to that extent, for liberty is not license; filth, though it may be tawdrily dressed up or concealed, remains filth whatever its form of expression or time of publication. That which is obscene connotes filth, impurity, indecency, and immorality."

Appellant (Br., pp. 15, 22, 24, 26) has cited Professor Zechariah Chafee. Professor Chafee has set forth some views upon obscenity which appellant has not cited. For example, says Chafee in "Free Speech in the United States" at p. 150:

"profanity and indecent talk and pictures . . . which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social

---

\* The same thought is repeated in Professor Chafee's *Government and Mass Communications* (p. 200), which is the report of the Commission on Freedom of the Press.

interests in order, morality, the training of the young, and peace of mind of those who hear and see. Words of this type offer little opportunity for the usual process of counter-argument. The harm is done as soon as they are communicated, or is liable to follow almost immediately in the form of retaliatory violence."

That the constitutional protection of freedom of speech and press do not cover such words is, the author said, "too well recognized to question their constitutionality" (p. 149). He noted the "immediate consequences" of "profanity and indecent talk and pictures" "to the five senses" (p. 150).

In "Government and Mass Communications" he says of obscenity, very simply (p. 215):

- ✓ ◯ "There must be some limit. A point is bound to be reached at which the court's stomach will turn."

This, when he is speaking of books, not the movies which augment the problem so much as to make it not merely a greater one but so much greater as to be an altogether different problem in kind\* (*infra*, cases).

In the first chapter of "Government and Mass Communications," *supra*, Professor Chafee says (pp. 5-6):

"\* \* \* we see no prospect that the community will cease thinking that some forms of expression are so bad that they ought to be stopped. Take obscenity, for example. We have to take account of the commercialization of animal appetites by men who are eager to amass large sums by supplying pornographic post cards to school children. We cannot protect the public by letting producers produce. It was objected that the market for obscenity depends on taboos in our culture and will vanish with these taboos, but there seems to be little chance of this happening while the animality of mankind is imperfectly blended with a

---

\* "Nothing is easier than not to read a book," Christopher Morley, New York Times Book Review, March 16, 1952, reviewing John Masefield's *So Long To Learn*.

high degree of civilization. The market does change from time to time as community standards change; but a market always remains. And hence the community will be strongly impelled to regulate the market.

"Thus the Commission does not regard freedom of the press as an absolute, but as one of the most important ideals of society which has to be balanced against other ideals such as the sound training of youth. The complete removal of limitations on mass communications, is, in our opinion, neither probable nor desirable."

The Commission on Freedom of the Press also published a separate work on "Freedom at the Movies", *supra*. At page 172 of that publication, speaking of "The Need for Some Controls" of motion pictures, the Commission declares (p. 172):

"Freedom, on the other hand, is not synonymous with complete lack of regulation. And a free screen does not include obscenity, indecency, lying, or fraud, either in principle or in constitutional practice."

Thus the decisions of this Court and the most liberal students in this field agree that even the speaker and the newspaper is not free to utter the obscene and the lewd.

This principle is not a contraction of the First Amendment's guaranties, but the exclusion from it of that which it was never intended to encompass. As Justice Frankfurter said in his concurring opinion in *Dennis v. United States*, 341 U. S. 494, 523:

"The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience, illuminated by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed?"

What these words conveyed as written into the Constitution was the yearning of men, who had known tyranny,

to be free to govern themselves, to dispute and if need be to censure those who govern them and the measures which they employed to govern; to express their own views of what was best. Therefore, it is not extraordinary and has perforce followed that "free speech is subject to prohibition of those abuses of expression which a civilized society may forbid" (*Dennis v. United States, supra*, at p. 523; *Chaplinsky v. New Hampshire, supra*, 315 U. S. at pp. 571-2).

As Mr. Justice Hughes said in *Near v. Minnesota, supra*, 283 U. S. 697, 708 (quoted in *Carpenters Union v. Ritter's Cafe*, 318 U. S. 722, 726);

"Whenever state action is challenged as a denial of 'liberty,' the question always is whether the state has violated 'the essential attributes of that liberty.'"

So undoubtedly a-libertarian as Alexander Meiklejohn in his "Free Speech and Its Relation to Government" (1948) has said (p. 104):

"The First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage."

By the same token it does not guarantee men the right to portray for the sake of profit anything and everything, however hurtful of the public welfare, serenity, and social order, however obscene and sacrilegious. As Professor Meiklejohn went on to say, the First Amendment

"intends only to make men free to say what, as citizens, they think, what they believe, about the general welfare."

The phrases "freedom of speech" and "freedom of the press" are "not a substitute for the weighing of values" (*Dennis v. United States, supra*, at p. 543). Back of the guarantees are faith in the power of appeal to reason (*Drivers Union v. Meadowmoor Co.*, 312 U. S. 287, 293).

But the obscene, the profane, the sacrilegious (particularly as portrayed in motion pictures, *infra*, pp. 45 *et seq.*) do not permit of counterargument (*Chafee, Freedom of Speech, supra*, p. 150; *Chafee, Government and Mass Communications, supra*, p. 200). As Mr. Justice Holmes said (*Frohwerk v. United States*, 249 U. S. 204, 206):

"We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

We also venture to believe that neither Hamilton nor Madison ever supposed that to regulate the exhibition of motion pictures so as to prevent the exhibition of the obscene, the indecent, the lewd, the sacrilegious, would be an unconstitutional interference with free speech. The constitutional guaranties do not grant "immunity" (*Giboney v. Empire Storage Co.*, 336 U. S. 490, 495, Mr. Justice Black) to such utterances, which are generically lawless and immoral; which society generally so regards and has so declared in common and statute law.

**The motion picture is not the equivalent of communication "by tongue or pen." In the application of the First Amendment, the vehicle of communication is a governing factor.**

Not only does the New York law as to the licensing of motion pictures reach only that which is not protected in any form of speech or writing, but mass communications, such as motion pictures, this Court has said many times in recent years, are not the equivalent in law of speech and writing insofar as the First Amendment is concerned.

Appellant's topical heading at page 11 of its brief (also argument p. 10) is the very kind of argument which Mr.

Justice Frankfurter said in *Kovacs v. Cooper, supra*, 336 U. S. 77, 96, misses the problem:

"Some of the arguments made in this case strikingly illustrate how easy it is to fall into the ways of mechanical jurisprudence through the use of oversimplified formulas. It is argued that the Constitution protects freedom of speech; freedom of speech means the right to communicate, whatever the physical means for so doing; sound trucks are one form of communication; *ergo* that form is entitled to the same protection as any other means of communication, whether by tongue or pen. Such sterile argumentation treats society as though it consisted of bloodless categories. The various forms of modern so-called 'mass communications' raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. Cf. *Associated Press v. United States*, 326 U. S. 1. Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated *Mutual Film Corporation v. Industrial Commission*, 236 U. S. 230."

In the same case, Mr. Justice Jackson said (p. 97):

"The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself \* \* \*."

See also *National Broadcasting Co. v. United States*, 319 U. S. 190, 226-227.

The principle was stated potently in Mr. Justice Frankfurter's opinion in *Hughes v. Superior Court*, 339 U. S. 460, 464, 465, 466, 469:

\* \* \* while picketing is a mode of communication it is inseparably something more and different. \* \* \* Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other

modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. \*\*\* It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. \*\*\*

"The constitutional boundary line between the competing interests of society involved in the use of picketing cannot be established by general phrases. \*\*\*

\*\*\* Generalizations are treacherous in the application of large constitutional concepts."

See also *Teamsters Union v. Hanke*, 339 U. S. 470, at p. 474, decided on the same day (May 8, 1950) as the *Hughes* case, and Mr. Justice Minton in yet another opinion rendered that day, *Building Service Union v. Gazzam*, 339 U. S. 532, 536-7.

Appellant bows, of course, (Br., p. 19) to the fact that this Court holds that motion pictures

"raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison" (*Kovacs v. Cooper*, 336 U. S. 77, at p. 96).

What appellant then (pp. 20-25) is asking this Court to do is to "revise" (cf. *Drivers Union v. Meadowmoor Co.*, *supra*, 312 U. S. at p. 296), the State's judgment that there are such evils in the portrayal in motion pictures of the obscene, indecent, sacrilegious, that the State regards it necessary to protection of "the social \*\*\* welfare" of the community, that it guard against their dissemination. But into a state's judgment of what it regards as necessary "to protect the social \*\*\* welfare" of the community this Court will not "intrude" (*Drivers Union v. Meadowmoor Co.*, *supra*, 312 U. S. 287, 299), for to do so would be to deny "the exercise locally of the sovereign power of the State" where there is "reasonable basis for legislation" (Bread

v. *Alexandria*, *supra*, 341 U. S. 622, 640). As Mr. Justice Reed's opinion in that case went on to say:

"Changing living conditions or variations in the experiences or habits of different communities may well call for different legislative regulations as to methods and manners of doing business."

To the same effect is Mr. Justice Minton's opinion in *Building Service Union v. Gazzam*, *supra*, 339 U. S. 532 at pages 537-538; *Carpenters Union v. Ritter's Cafe*, *supra*, 315 U. S. 722, 725-726; *Sterling v. Constantin*, 287 U. S. 378, 398; *Crowley v. Christensen*, 137 U. S. 86, 89-90.

"Due recognition of the powers belonging to the states" as well as "zealous regard for the guarantees of the Bill of Rights" are equally this Court's concern when issues projecting both are before it (*Drivers Union v. Meadowmoor Co.*, *supra*, at pp. 296-297).

A state's judgment in this sphere "embracing as such a judgment does \* \* \* a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect" (*Teamsters Union v. Hanke*, *supra*, 339 U. S. 470, 474-475).

"That other states have chosen a different path in such a situation" [which fact appellant seeks to translate into an argument, Br., p. 20] "may indicate a difference of social view but that is in the realm of the wisdom of legislation with which the courts are not concerned" (*Drivers Union v. Meadowmoor Co.*, *supra*, 312 U. S. at pp. 296-297).

As we have reviewed *supra*, courts, writers, federal, state and local laws, deem it for the public and social business order and welfare, that the dissemination of obscene, lewd and sacrilegious matter be curbed. Since early in the advent of the motion picture to the present, this policy has

existed as to motion pictures. There are the two federal laws, seven state laws, and local laws in some two hundred cities, all adopted in the belief and desire of the people that motion pictures should be controlled in these respects.

This adoption of similar requirements by the federal government, some states and many cities, "evidences a deep seated conviction both as to the presence of the evil and as to the means adapted to check it" (*West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 399; see also *Teamsters Union v. Hanke, supra*, 339 U. S. 470; *Building Service Union v. Gazzam, supra*, 339 U. S. 532).

Appellant (Br., pp. 20-24) tries to measure laws such as these by a "danger" test. Danger in the sense of peril has no application to such laws. The test is, as was stated by Mr. Justice Reed in *Breard v. Alexandria, supra*, 341 U. S. 622, 640-641, whether there is a reasonable basis for the legislation "to protect the social \* \* \* welfare of a community." And as Mr. Justice Murphy said in *Chaplin v. New Hampshire, supra*, 315 U. S. at p. 572, "The lewd, obscene, the profane" "by their very utterance inflict injury."

We submit that it has been shown that there is surely a reasonable basis for the curbing of the obscene, the lewd, the sacrilegious, as evidenced by the widespread adoption of laws of many kinds, to curb the dissemination of such matter.

It must give pause to face the realization that

"Invalidation here would mean denial of power to Congress as well as to forty-eight states" (*Teamsters Union v. Hanke, supra*, 339 U. S. 470, 478)

and to the hundreds of localities which have found that the well-being, serenity, peace and order of the community and its people require such control.

**The Public Policy in New York State as articulated by Representatives of the Public and by the Legislators is that the New York Law is necessary.**

Prior to 1934 a bill had been introduced in the New York Legislature from time to time to repeal or modify the film licensing law, but the bills had never moved beyond the introduction. In 1934 the member of the Legislature who introduced such a bill demanded that his bill receive a public hearing. The records of the Department of Education show that among the civic organizations appearing at the hearing and voicing unanimous sentiments against the repeal of the statute were the following:

Judge Jeanette Brill, Magistrate of the City of New York, representing Women's Clubs.

Dr. James Lee Ellenwood, State Secretary, State Executive Committee, Y. M. C. A.

Charles J. Tobin, representing Catholic Diocese of the City of Albany and vicinity.

Miss Beulah Bailey, State Federation of Women's Clubs, representing 500,000 members.

Mrs. Franklin Blake, President of State Congress of Parent Teachers. (New York City organization)

Mrs. R. D. Glasgow, representing New York Branch of Association of University of Women.

Dr. Arvie Eldred, Secretary, New York State Teachers Association, representing 45,000 teachers of the State of New York.

Mrs. Phillip S. Wakeley, State Chairman of Legislation, New York State Congress of Parents and Teachers, representing 73,000 members.

Rev. William Peck, representing Protestant churches of the State.

Mrs. Wellington Jones, President of Capitol District Council, Girl Scouts of America.

Rev. Dorr E. Fritts, President of Ministerial Association of Troy and vicinity, representing 85 churches.

Mrs. William C. White, Motion Picture Editor for Parent Teachers, Schenectady.

Mrs. J. Francis Purdy, Albany Parent Teachers Association.

Also opposed were the officials who had had the experience of viewing motion pictures applying for licenses, the Chairman of the original Motion Picture Commission and the Counsel to the Education Department. Only the introducer of the bill and Canon William Schaeffe Chase, President of the New York Civic League appeared in favor of the bill. Premised upon this almost unanimous opposition to the repeal of the law, the bill died in committee. From 1934 through the current 1952 session of the New York State Legislature no organization and no legislator has ever introduced a bill to repeal or modify the law now before this Court. The Motion Picture Industry itself has never sponsored or advocated repeal.

Inherent in the art and mode of exhibition of the motion picture is the potential that is the altogether reasonable basis for some control and that requires the difference in the application of constitutional guarantees.

In an opinion in *Radio Corp. v. United States*, 341 U. S. 412 (1951), Mr. Justice Frankfurter said (pp. 425-426):

"It is an uncritical assumption that every form of reporting or communication is equally adaptable to every situation. Thus, there may be a mode of what is called reporting which may defeat the pursuit of justice. . . .

"Man forgets at terrible cost that the environment in which an event is placed may powerfully determine its effect. Disclosure conveyed by the limitations and power of the camera does not convey the same things to the mind as disclosure made by the limitations and power of pen or voice. The range of presentation, the opportunities for distortion, the impact on reason, the effect on the looker-on as against the reader-hearer, vary; and the differences may be vital. Judgment may be confused instead of enlightened. Feeling may be agitated, not guided; reason deflected, not enlisted."

Every member of the Court knows from personal experience that the vibrant, vivid, graphic portrayal in a motion picture has an impact that the lecturing voice of a speech, the cold type of the written page, the still picture in a magazine does not. Add to that the setting in which the movie is viewed—the darkened theatre, the relaxed receptive mood, the complete concentration on the presentation, the company of a sizable or even vast audience, all simultaneously silently focusing on the screen. Add also the vast numbers which the motion pictures reach, "the wider and less selected" audiences (Mr. Justice Holmes in *Fox v. Washington*, 236 U. S. 273, 277), made up of men and women together, of teen age boys and girls together, of adolescent boys and girls together, and of children. This is set forth in fuller detail by those who know the subject best, The Motion Picture Producers in their Code (2 D, *et seq.*) quoted *supra*, pp. 25-27.

There we have the difference in "values," in potential evils, that is the reasonable basis for some control legislation and that requires the difference in the application of constitutional guarantees (*Kovacs v. Cooper, supra*, 336 U. S. 77, at pp. 96, 97).

Preventive measures and punishment for abuse of constitutional freedoms are alternative forms of regulation adopted as circumstances indicate. The form of regulation is within the State's discretion.

In common with the federal laws and other state and local laws as to motion pictures, the New York law is a preventive one, that is to say, inspection is made prior to exhibition.

As a matter of fact, the law did not so operate in appellant's case (*infra*, point III). "The Miracle" ran for

some weeks and the license was revoked thereafter (*supra*, "The Facts"). Thus, as to appellant and this particular motion picture, the exercise of control was not prior to exhibition.

Appellant urges that while it would be constitutional to punish abuses, it is not constitutional to take the preventive measure.

This Court has in its decisions recognized that such a rule would not reach the fundamental issue, which is always whether the competing interests of the individual and the community indicate that complete freedom of communication may in the particular case prevail. For, of course, punishment is equally as restrictive of that freedom as prevention. This Court, therefore, couples prevention or punishment; prevention and punishment (*Terminiello v. Chicago*, 337 U. S. 1, 4; *Associated Press v. United States*, 326 U. S. 1, 7; *Chaplinsky v. New Hampshire*, *supra*, 315 U. S. 568, 571) and does not permit punishment or does permit prevention as the situation requires (for example, *Giboney v. Empire Storage Co.*, *supra*, 336 U. S. 490; *Hughes v. Superior Court*, *supra*, 339 U. S. 460; *Schenck v. United States*, 249 U. S. 47; *Chaplinsky v. New Hampshire*, *supra*; *Near v. Minnesota*, *supra*, 283 U. S. 697). The method of regulation is for the State to determine, as the cited decisions declare:

"The form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice" (*Hughes v. Superior Court*, *supra*, at p. 468).

The motion picture, as the Congress, the several states and numbers of cities have agreed (*supra*), compels the form of control to be prevention. Once the picture is shown, the evil has occurred. Motion pictures frequently

have brief runs, sometimes just a few days, and were the form of control to be punishment, the evil would have been completed before action could be taken. As Professor Chafee has stated, "the harm is done as soon as" the obscene talk or picture is communicated (*Free Speech in the United States, supra*, p. 150).

Moreover, a motion picture having one showing in a large theatre, such as Radio City Music Hall in New York, would have been viewed by several thousand persons; if it ran for just a day it would have been viewed by four or five times several thousand. If it is released at the same time in several large cities in the State, that number is compounded. It is reasons such as these which compel the form of regulation to be as to motion pictures that of prevention, rather than subsequent action.

As to the exhibitors of motion pictures, it works to their benefit that the approval or disapproval comes in advance (cf. Chafee, *Free Speech in the United States, supra*, p. 534).

**Under the statutes in New York State, particularly the Penal Law, motion pictures are subjected to but one scrutiny. When they are licensed by the Education Department, they may be shown anywhere in this State.**

Messrs. Ernst and Lindey tell the story as factual (in "The Censor Marches On," cited in appellant's Br., p. 22) that when the New York statute here involved was introduced in the Legislature, some of the producers on the west coast got together and decided to fight it. Expecting the cooperation of exhibitors, they sent an emissary east to organize the opposition. As the authors tell the story (p. 75):

"He was in for a surprise. The exhibitors shook their heads. They had no intention of fighting censorship, they said. On the contrary, they'd welcome it. There was a criminal statute in New York against obscene shows. Without censorship, exhibitors ran the risk of prosecution if they played a salacious picture. Censorship would place an official stamp of approval on all films, and would insure theater owners against criminal charges for indecency."

And that is precisely what has happened. By specific statute and decision in New York state, it is demonstrated how prior licensing benefits the motion picture exhibitor. Because it obtains, Section 1141 of the New York Penal Law, which makes it a misdemeanor to sell, distribute or exhibit obscene pictures and writings—including books, magazines and newspapers—specifically excludes motion pictures which have been licensed, viz.:

"This subdivision shall not apply to motion picture films licensed by the state department of education."

In connection with this very motion picture "The Miracle," prior to the revocation of its license by the Regents, the New York City Commissioner of Licenses suspended the license of the theatre in which it was being shown (upon the ground that the film was blasphemous). The New York Supreme Court held his action unauthorized, saying (*Burstyn, Inc. v. McCaffrey, supra*, 198 Misc. 884, 885):

"The right to determine whether a motion picture is indecent, immoral or sacrilegious is vested solely and exclusively in the Education Department of the State. Complete regulations for review and licensing are provided by statute (Education Law, §§ 120-132). This power negatives the existence of coequal powers in any municipal officer (*Hughes Tool Co. v. Fielding*, 188 Misc. 917, affd. 272 App. Div. 1048, affd. 297 N. Y. 1024), and a legal law which purports to give such

municipal officer regulatory powers as to the content of films is unconstitutional and void (*Monroe Amusement Co. v. City of Rochester*, 190 Misc. 360).

" \* \* \* the Legislature forbade criminal prosecution for the exhibition of a licensed motion picture (Penal Law, § 1141). \* \* \* This means that peace officers have duties in respect to films, for instance bringing to justice the exhibitor of an unlicensed film which offended against decency. But it is clear that they have no duties with respect to the content of films which have been licensed."

Appellant (Br., pp. 31, 38) is fearful of the possibilities of abuse in application of the statute and urges that such possibilities render it void. This Court will not strike down a statute in apprehension that on some far away day it will be perverted in application. There are few statutes which are not capable of abuse in application. This Court will not assume in advance that they will be misapplied (Mr. Justice Douglas in *Allen-Bradley Local v. Board*, 315 U. S. 740, 746; Mr. Justice Black in *United States v. Petrillo*, 332 U. S. 1, 11-12; Mr. Justice Frankfurter in *Niemotko v. Maryland*, *supra*, 340 U. S. at p. 289; *Crowley v. Christensen*, *supra*, 137 U. S. 86; Mr. Justice Holmes in *Fox v. Washington*, *supra*, 236 U. S. 273, 277). The presumption is otherwise.

In fact in the forty or more years that there have been laws (federal, state and local), regulating the exhibition of motion pictures, the Motion Picture Industry has—in what must have been fair freedom—thrived and grown, and, as appellant contends, improved its standards.

There is nothing before this Court which would indicate that its holding in the Mutual case was unwise.

There is nothing before the Court which would indicate any sound reason for reversal of its opinion. The New York motion picture law has been on the statute books of the State since 1921 (Chap. 715, L. 1921). Since that time the Division has examined approximately 57,000 films. It has only been in rare instances that its act in refusal to license has been challenged in the courts. The courts have sustained its decision so far in every instance. Thus, the Department of Education has obviously acted with extreme restraint. It has found it necessary most frequently to apply the statutory regulation not to films made in the United States, but to foreign films made under conceptions of decency not in accord with American standards, public opinion and policy.

In other words, the appellant can point to nothing by way of argument or fact which even suggests that the power or discretion under the New York Law has been abused. There have never been any complaints as to timing. The Division has bent over backwards to see to it that films are swiftly processed. There has been no criticism on the part of the general public from which the appellant herein can gain any comfort in any argument looking toward a reversal of the opinion of this Court.

The people of the State of New York, we think, believe that premised upon this Court's decision in 1915 in the *Mutual* cases, in examining and in licensing films and in eliminating those contravening the statute, the State and the Education Department have accomplished much in the public service to the State. There is nothing before the Court to the contrary.

Any theory that it would be better to eliminate preconsideration and permit local agencies through injunctions or, perhaps, prosecutions, to stop motion pictures if they violate some provisions of the penal laws (in respect to indecency or obscenity) establishes, in itself, a chaotic situation resulting in multitudinous lawsuits,—certainly not in the interest of the public, nor the industry.

## II

To portray the sacrilegious in a motion picture is not an expression of the exhibitor's freedom of religion under the protection of the Constitution. On the contrary it is a violation of the public's freedom of religion.

To decline to license sacrilegious films is within the State's police power. It does not entail any participation in religious affairs.

The word "sacrilegious" has a well understood meaning and is as precise as a statute is required or could be practically.

Appellant's brief (Points III and IV; and pp. 9, 37) contends that the constitutional guaranty of freedom of religion gives motion picture exhibitors the unlimited right to lampoon and vilify all religion and any religion.

There could not be a grosser distortion of the most precious right guaranteed by our Constitution—the right to worship God, each according to his own belief; the right to follow one's own religious faith in an atmosphere of tolerance, respect and understanding.

James Madison explained to the Congress the meaning of the guaranty of religious freedom when it was being written into the First Amendment. As Mr. Justice Reed

in his dissenting opinion in *Murdock v. Pennsylvania, supra*, 319 U. S. 105, relates Madison's explanation appearing in the record of the Congress (319 U. S. at p. 125);

"‘no religion shall be established by law, nor shall the equal rights of conscience be infringed.’ 1 Annals of Congress 729.

“He said that he apprehended the meaning of the words on religion to be that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. *Id.*, 730.”

Is lampooning religion in a motion picture being exhibited for profit, pursuit of that freedom?

The New York Court of Appeals viewed “The Miracle”. The Court’s opinion introduces the description of the film by saying: (R. 152; 303 N. Y. at pp. 256-7)

“We have all viewed the film in question. The so-called exhibits, which are simply unsworn communications expressing personal opinions, are of little help to us. The principal basis for the charge of sacrilege is found in the picture itself, the personalities involved, the use of scriptural passages as a background for the portrayal of the characters, and their actions, together with other portions of the script and the title of the film itself. It is featured as a ‘way of love’. At the very outset, we are given this definition: ‘ardent affection, passionate attachment, men’s adoration of God, sexual passion, gratification, devotion’.”

We adopt the Court’s description of “The Miracle” (R. 152-3, 303 N. Y. at p. 257):

“While the film in question is called ‘The Miracle’, no miracle is shown; on the contrary, we have the picture of a demented peasant girl meeting a complete stranger whom she addresses as ‘Saint Joseph’. At the very beginning of the script, reference is made to ‘Jesus, Joseph, Mary’. ‘Saint Joseph’ first causes

her to become intoxicated. Scriptural passages referring to the Holy Sacrament (Luke 22:19), and to the nativity of Christ (Matthew 1:20), are freely employed immediately after she states she is not well. A blackout in the film, in its association with the story, compels the inference that sexual intercourse and conception ensue. 'Saint Joseph' abandons her immediately following the seduction, she is later found pregnant, and a mock religious procession is staged in her honor; she is 'crowned' with an old washbasin, is thrown out by her former lover, and the picture concludes with a realistic portrayal of her labor pains and the birth in a church courtyard of her child, whom she addresses as 'my blessed son', 'My holy son'."

The sacrilege of "The Miracle", as already noted, lies not only in that it "encroaches" upon the relationship of Christ, Mary and Jesus, a relationship held sacred by millions\*, and upon the "Biblical presentation" of that relationship, but in that it "utterly destroys it, associating it, as the Regents found, 'with drunkenness, seduction, mockery and lewdness', and, in the language of the script itself, with 'passionate attachment . . . sexual passion' and 'gratification', as a way of love" (R. 153, 303 N. Y. at p. 259).\*\*

Appellant does not claim that either it or the producers or performers were expressing any religious beliefs contrary to those of the Christian faith in respect to the relationship of Christ, Mary and Joseph. Appellant does not claim that "The Miracle" was criticizing, as an expression of any one's religious views, that the Christian concept of that relationship was an erroneous belief. Appellant does not claim that "The Miracle" was proselytizing.

\* Cf. Mr. Justice Douglas in *U.S. v. Ballard*, 322 U. S. 78 at p. 87.

\*\* The holding of the State Court that the motion picture is sacrilegious will be accepted "as binding" by this Court (*Cantwell v. Connecticut*, 310 U. S. 296. See also *Chaplinsky v. New Hampshire*, *supra*, 315 U. S. 568, 573-4.)

That would be the portrayal of religious dogma which the New York statute does not prevent. It prevents only the vilifying and reviling of the religious beliefs of any segment of the population, whatever segment and whatever religious persuasion may be involved, for the derivation of profits from the presentation of entertainments. In the words of Duncan, J., in the *Updegraph v. Commonwealth*, 11 Serg. & R. (Pa.) 394, 409, case, "by such blasphemous vilification" \*\*\* "no one pretends to prove any supposed truths, detect any supposed error, or advance any sentiment whatever."

As an expression of one's own religious views and to win adherents to it, this Court has held speech and writing to be protected, even when they include extreme criticism of other religious beliefs. However such cases involved expression of religious belief by those who uttered them. None were burlesque of a religious belief for the sheer purpose of producing a motion picture that would make money at the box office. For example, in *Cantwell v. Connecticut*, *supra*, 310 U. S. 296 (App's Br, p. 44) the phonograph record was exhibited to the persons accosted, not, as here, for amusement and entertainment for profit, but as an earnest attempt at religious persuasion and proselytization, as a means of conveying religious thought and opinion. In fact the Court's opinion pointed out that Cantwell's "deportment" was not "noisy, truculent, overbearing or offensive" (310 U. S. at p. 308).

In *Chaplinsky v. New Hampshire*, *supra*, 315 U. S. 568, Mr. Justice Murphy said:

"We cannot conceive that cursing a public officer is the exercise of religion in any sense of the term" (p. 571).

So here it cannot be conceived that lampooning and ridiculing for profit the solemn and sacred religious tenets of those who believe in the Divinity of Christ and the Virgin Birth is the exercise of religion. The Constitution of the State of New York and of the United States guarantees freedom of religion. It is wholly within the guarantee of religious freedom that the State prohibits that which seeks to destroy religion. Suppose there were a motion picture which depicts religion and those who believe in religion as fools, as insane, as immoral. Suppose that the picture was so cleverly presented that it lampoons those who attend church, those who hold dear religious beliefs. Suppose it caricatures the miracles of Christ, the tabernacles of the Jews, the mosques of the Mohammedans. In "The Miracle" the Virgin is crowned with a dishpan and flowers are flung at her in mock tribute. If one such picture is permissible, it could be multiplied and the motion pictures flooded with sacrilegious presentations with the ultimate effect of destroying religion through lampooning it, whether the producers so purposed or not. Is the State helpless to prevent that?

In the present case, we recall once again, that the Regents received quantities of mail from hundreds of people who felt that the picture was an affront, not to them personally but to all those of their religious belief who hold the concepts of the Divinity of Christ in sanctity. In coming to the conclusion which they did, the Regents stated:

"In this country, where we enjoy the priceless heritage of religious freedom, the law recognizes that men and women of all faiths respect the religious beliefs held by others. The mockery or profaning of these beliefs that are sacred to any portion of our citizenship is abhorrent to the laws of this great State. To millions of our people, the Bible has been held sacred and by them taught, read, studied and held in rever-

ence and respect. Generation after generation have been influenced by its teachings. This picture takes the concept so sacred to them set forth in both the Protestant and Catholic versions of the volume (St. Matthew, King James and Douay version, Chapter I, verses 18-25) and associates it with drunkenness, seduction, mockery and lewdness."

Of appellant's argument that freedom of religion is denied when a motion picture may be refused a license on the ground of sacrilege because one man's sacrilege is another man's dogma, and one may thus be prevented from propagating his own religious views by means of motion pictures, the Court of Appeals said that such argument was "specious when applied to motion pictures offered to the public for general exhibition as a form of entertainment . . . Religious presentation, as ordinarily understood, as well as other educational and scientific films, are exempt (Education Law Section 123). Thus freedom of religion is not impaired in the slightest, as anyone may express any religious or anti-religious sentiments he chooses through a proper use of the films" (R. 153-4, 303 N. Y. at p. 258).

Appellant carries its argument to the ridiculous (at pp. 37-38) when it proposes the possibility of refusing to license as sacrilegious motion pictures which depict practices which are contrary to some religious beliefs. In fact, appellant projects there exactly what the New York law does not embrace and the constitutional propriety of what it does cover. Appellant cites as example burial of the dead, jewelry, tobacco and shaving, opposed or forbidden respectively by the Doukhobors, the United Pentecostal Church, The Church of Nazarene and Church of the House of David. Burial of the dead is depicted in many motion pictures,

About every woman on the screen wears jewelry, every other man on the screen smokes and many scenes of a man shaving are portrayed. Likewise there have been war pictures since movies began (a flux of them following the end of World War II), notwithstanding the Quakers' opposition to war. The classic "Yellow Jack" and other motion pictures have glorified the achievements of science notwithstanding Christian Science beliefs. There have in recent years been beautiful and delightful pictures portraying nuns and priests and their good work ("Come to the Stable," "Song of Bernadette," "Going My Way") notwithstanding the religious view of non-Catholics.

No one has thought of objecting to any of these, for none of them, of course, *ridicules* the religious beliefs or scruples of those who are not in agreement, and therefore are not sacrilegious as to those beliefs. The mere presentation in motion pictures of some fact which may be contrary to the religious precept of some particular group, of course, does not come within the meaning of the term "sacrilegious."

As further illustration, Jehovah's Witnesses object to saluting the Flag. They may not approve a picture showing school children saluting the Flag, but that does not make a scene wherein the Flag is saluted "sacrilegious" in their sight nor within the statute. Or the picture of a white cow might offend Hindus (Br., p. 38). But the mere representation of a white cow on the screen is not "sacrilegious." However, if there were a scene in which the Hindu conception of the sacredness of a white cow were lampooned and ridiculed the picture would then become sacrilegious.

As the exclusion of the obscene is in the State's police power, so is the exclusion of the sacrilegious.

"The statute now before us is clearly directed to the promotion of public welfare, morals, public peace and order \*\*\* the traditionally recognized objects of the exercise of police power" (Court of Appeals opinion R. 155; 303 N. Y. at p. 259.)

The curb that it imposes upon the exhibition of sacrilegious motion pictures as well as obscene, indecent, immoral, inhuman and those that would tend to corrupt morals or incite to crime, is in the exercise of police power in the interests of public welfare, morals, public peace and order (*Carpenters Union v. Ritter's Cafe, supra*, 315 U. S. 722; *Crowley v. Christensen, supra*, 137 U. S. 86; *Drivers Union v. Meadowmoor Co., supra*, 312 U. S. 287; *Eureka Productions, Inc. v. Lehman, Governor, et al., supra*, 304 U. S. 541).

In this phase the Court of Appeals opinion continued (R. 155; 303 N. Y. at p. 259);

"For this reason, any incidental benefit conferred upon religion is not sufficient to render this statute unconstitutional. There is here no regulation of religion, nor restriction thereof or other interference with religious beliefs except insofar as the picture itself does so, nor is there any establishment of religion or preference of religion or use of State property or funds in aid of religion. There is nothing more than a denial of the claimed right to hurl insults at the deepest and sincerest religious beliefs of others through the medium of a commercial entertainment spectacle."

A companion case to *Mutual Film Corp. v. Ohio* was *Mutual Film Corp. v. Hodges, supra*, 236 U. S. 248. This involved a statute of Kansas which required the denial of a license to a motion picture which was "sacrilegious" as well as to those which were obscene, indecent and immoral (236 U. S. at p. 257). This Court upheld the constitution-

ability of that statute too, holding that it was a valid exercise "of the police power of the states" and did not interfere with "liberty of opinion" (236 U. S. at p. 258). The Court of Appeals opinion in the instant case made reference to the *Hedges* case (R. 151; 303 N. Y. at p. 256).

As to whose religious freedom is invaded by ridiculing any religious faith in a movie the Court of Appeals said:

"To say that government may not intervene to protect religious beliefs from purely private or commercial attacks or persecution, whatever the underlying motive, and, however skillfully accomplished, as distinguished from the assertion of conflicting beliefs, is to deny not only its power to keep the peace, but also the very right to 'the free exercise' of religion, guaranteed by the First Amendment." (R. 155, 303 N. Y. at p. 259)

The Court then added this most serious thought (R. 155-6; 303 N. Y. at pp. 259-260):

"The offering of public gratuitous insult to recognized religious beliefs by means of commercial motion pictures is not only offensive to decency and morals, but constitutes in itself an infringement of the freedom of others to worship and believe as they choose. Insult, mockery, contempt and ridicule can be a deadly form of persecution—often far more so than more direct forms of action. The prohibition of such conduct comes within the legitimate sphere of State action, and this State has recognized this principle, not only in the Education Law but in other respects as well (see, e. g., Penal Law, art. 186; Civil Rights Law, art. 4). We are not aware that this power has ever been even impliedly denied to the States.

"This nation is a land of religious freedom; it would be strange indeed if our Constitution, intended to protect that freedom, were construed as an instrument to uphold those who publicly and sacrilegiously ridicule and lampoon the most sacred beliefs of any religious denomination to provide amusement and for commercial gain."

*Hughes v. Superior Court, supra*, 339 U.S. 460, was decided upon the basis of the consideration thus voiced by Judge Froessel. The picketing disallowed in that case was to compel employment on the basis of race, and Mr. Justice Frankfurter said at pp. 464, 468:

"In disallowing such picketing States may act under the belief that otherwise community tensions and conflicts would be exacerbated. The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of law. The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations. \*\*\*"

"The policy of a State may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate. \*\*\*"

The glory and the triumph of Americanism is the multiple races and religions dwelling together peaceably under governmental principles of respect for every religious belief and religious practice. Nothing is so calculated to provoke hostility as ridicule and mockery; nothing so much as ridicule and mockery of race and religion. For man is most sensitive where his race and religion are concerned. History's record of religious wars and race riots attest to where racial and religious conflicts have led. This Court is completely cognizant of the extremes of discord that attacks upon race and religion can breed (*Hughes v. Superior Court, supra*; *Niemotko v. Maryland*, 340 U. S. 268, pp. 273 et seq. [concurring opinion of Mr. Justice Frankfurter]; *Kunz v. New York*, 340 U. S. 290, pp. 295 et seq. [dissenting opinion of Mr. Justice Jackson]; *Terminiello v. Chicago*, *supra*, 337 U. S. 1, pp. 13 et seq. [dissenting opinion of

Justice Jackson]; See also *Trinity Methodist Church, South v. Federal Radio Communication, supra*, (62 Fed. 2d, 850, 853, cert. den. 284 U. S. 685).

In the balancing of interests, it is submitted, freedom of business men to exhibit motion pictures for profit no matter how mocking of sacred religious beliefs, yields to the public interest in preserving the "Domestic Tranquility" for which our Constitution was ordained. The Preamble of the Constitution lists its purposes in the conjunctive; none is more significant than another. The importance of "Domestic Tranquility" is cognate with the importance of "liberty" (*Terminiello v. Chicago, supra*, at p. 34). To realize both in largest measure there must be accommodation between the limit to which personal liberty may be carried and the measures the State may take to insure domestic tranquility. The minor value to the community's well-being in the purpose for which a particular liberty is sought weighs heavily in determining to what length it may be carried and at what point the State may introduce the check of its police power (*Dennis v. United States, supra*, 341 U. S. 494; *Drivers Union v. Meadowmoor Co., supra*, 312 U. S. 287; *Niemotko v. Maryland, supra*, 340 U. S. 268; *Teamsters Union v. Hanke, supra*, 339 U. S. 470).

#### Free speech

"is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if interference with free expression of ideas is not found to be the overbalancing consideration" (*Niemotko v. Maryland, supra*, 340 U. S. 268, 282).

In the present case, the phrases "free speech" and "free press" are not to be employed as a touchstone where the expression sought to be left free is the obscene, the indecent, and the sacrilegious. Surely such expression is not an

"overbalancing consideration," and the important interest of which this Court applying the Constitution is to be mindful, is the public and social order.

Cooley in *Constitutional Limitations* (p. 1223) has described the police power of a State as embracing "its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

The police power, Mr. Justice Holmes said in *Noble State Bank v. Haskell*, 219 U. S. 104, 111, "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and predominant opinion to be greatly and immediately necessary to the public welfare." "Many laws", he said (at p. 110) "which it would be vain to ask the Court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power." And see Chief Justice Hughes in *West Coast Hotel Co. v. Parrish, supra*, 300 U. S. 379, 391.

For an ordered society, the State under its police power may prohibit polygamy notwithstanding it is practiced as a matter of religious belief (*Reynolds v. United States*, 98

U. S. 145, 165, 166), and may prohibit the publication of "blasphemous or indecent articles, or other publications injurious to public morals," notwithstanding individual's freedom of speech and the press (*Robertson v. Baldwin, supra*, 165 U. S. 275, 281).

**To prevent the burlesque of a religious belief in a motion picture does not "establish" that belief.**

To appellant's argument that to determine that a motion picture is sacrilegious requires the making of a religious judgment and acceptance of religious dogma, and therefore requires a government official to pass on matters of religion (Br. point III), the Court of Appeals Opinion gave the complete and simple answer (at p. 258):

"Nor is it true that the Regents must form religious judgments\* in order to find that a film is sacrilegious. As hereinbefore indicated, there is nothing mysterious about the standard to be applied. It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule to the extent that it has been here, by those engaged in selling entertainment by way of motion pictures. As the court below said of the statute in question, 'All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom.' (278 App. Div. 253, 258.)

"Although it is claimed that the law benefits all religions and thus breaches the wall of separation between Church and State, the fact that some benefit may incidentally accrue to religion is immaterial from the constitutional point of view if the statute has for its purpose a legitimate objective within the scope of the

---

\* Appellant's contention (Br. pp. 33, 43) that judgment of what is sacrilegious must be subjective is exploded by the concrete fact that the Regents committee and the entire body, which concluded that "The Miracle" is sacrilegious, is made up of individuals of various religious faiths.

police power of the State (*Everson v. Board of Educ.*, 330 U. S. 1; *Cochran v. Louisiana State Bd. of Educ.*, 281 U. S. 370; *Bradfield v. Roberts*, 175 U. S. 291; *People v. Friedman*, 302 N. Y. 75, appeal dismissed for want of substantial Federal question 341 U. S. 907)."

To restrain the ridiculing of religion or of any religious belief is not "aid" in a positive sense nor is it adopting or enforcing any religious belief. From the time the license for the motion picture "The Miracle" was revoked and by such revocation, neither the Christian concept nor specifically the Catholic concept of Christ and His relationship to Mary and Joseph, was compelled as "established" religion nor forced upon any one. Indeed to prevent the sacrilegious in a film is the very "neutrality" for which appellant argues (Br. p. 42). It puts into application the fundamental American constitutional principle that anyone's religious belief and practice shall not be destroyed by laughter—than which nothing is more destructive.

The language of the statute is as precise as the law requires that it be and as it can be practically.

Appellant (Br. point II) charges vagueness of the statute apparently involving in that charge all the grounds upon which a license can be denied. The stress is on the charge that "sacrilegious", the ground upon which "The Miracle" license was revoked, is vague of meaning.

First, it is to be recalled, that the requirement for precision in a statute is most seriously regarded in statutes imposing criminal penalties (*Boyce Motor Lines v. United States*, 342 U. S. 337; *Winters v. New York*, *supra*, 333 U. S. 507, 515), while the effect of the statute here is to withhold the license from the motion picture.

But at all times and in all cases, courts are completely realistic in the exactness they demand of words. Courts do

not determine the meaning of language by semantic dissection as appellant has done in its brief (Br. p. 35).

As this Court said in a decision just a week ago (*United States v. Hood*, March 31, 1952) effect is given to the "ordinary reading" of a statute; to its meaning "as a matter of ordinary English speech".

Recently also in the *Boyce Motor Lines* case (*supra*) (January 28, 1952) this Court said to the requirement of definiteness:

"But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the lines. *Nash v. United States*, 229 U. S. 373, 377 (1913); *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 502-503 (1925); *United States v. Petrillo*, 332 U. S. 1, 7-8 (1947)."

In *Kovacs v. Cooper*, *supra*, the contention was made that the words "loud and raucous" were vague, obscure and indefinite. Mr. Justice Reed replied cryptically that this contention merited "only a passing reference". He said (336 U. S. at p. 79):

"While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."

Such a broad and general phrase as "public interest, convenience and necessity" is held "as concrete" as the

factors involved permit and sufficiently definite to guide administrative action (*National Broadcasting Co. v. United States, supra*, 319 U. S. 190).

The words "obscene", "lewd", "indecent", "sacrilegious" are not words of art or science which require or are capable of precise definition (*Chaplinsky v. New Hampshire, supra*, 315 U. S. 568; *Rosen v. United States, supra*, 161 U. S. 29). They are words of "common speech" (*Eisner v. Macomber*, 252 U. S. 189, 207; see also *Irwin v. Gavit*, 268 U. S. 161, 168 [Mr. Justice Holmes]) which popularly convey clear enough meaning (See, Thayer, *Legal Control of the Press, supra*, p. 276).

Similarly, the word "sacrilegious" is a word of "common speech". It popularly conveys the meaning of irreverence of religious beliefs and precepts. Definitions may vary, but that is the meaning as the Court of Appeals said in this case (R. 151):

"Dictionary, however, furnishes a clear definition therefore, were it necessary to seek one, as, e. g., 'the act of violating or profaning anything sacred' (Funk & Wagnall's New Standard Dictionary, 1937). There is no difficulty in recognizing the limits of the criterion thus established, and the courts have had no problem either with the word 'sacrilegious' or with its synonym, 'profane'."

A sacrilegious motion picture is one that is irreverent of religious beliefs and precepts—one such as "The Miracle" which ridicules, mocks, burlesques or lampoons what Courts will take judicial notice is a solemn and sacred religious belief of at least a segment of our population (*United States v. Ballard, supra*, 322 U. S. 78, 87).

Speaking of an analogous term "blasphemy", Thayer, *Legal Control of the Press, supra*, says (pp. 287-288):

"Blasphemy in a legal sense means words spoken or written which express a contempt for God or for things held sacred by mankind. In a broad sense, blasphemy may mean any irreverent declaration or profanity.

"Blasphemy does not mean that there cannot be a serious and honest criticism of Christian religion or of God, Jesus Christ, or the Virgin Mary, or that there cannot be a comparison of the ethics or values of different religious beliefs. To be actionable the blasphemous words must be truly irreverent and designed to bring Things or Persons Divine into contempt. \*\*\* courts are wont to take judicial notice of the common religious hopes and beliefs."

There may well be borderline cases as to whether a particular motion picture is sacrilegious. There will be borderline cases in respect to many, many statutes as to whether particular conduct comes within the statute involved. But that does not condemn the statute. When and if a situation such as appellant conjures up at page 31 of its brief, arises, will be the time to resolve it (see *supra*, end of point I).

In *United States v. Hood, supra*, this Court (in a criminal case) held that the construction of the statute did not "offend the requirement of definiteness". "The picture of the unsuspecting influence merchant, steering a careful course between violation of the statute on the one hand" and evasion of it on the other, "entrapped by the dubieties of this statute" "is not one to commend itself to reason". To the same effect *Boyce Motor Lines v. United States, supra*; *United States v. Wurzbach*, 280 U. S. 396; *Rosen v. United States, supra*, 161 U. S. 29.

In the same way appellant's contention (pp. 34-36) that the distributor here could not have anticipated that the statute would be applied to a mockery of a religious con-

cept because the derivation of the word "sacrilegious" means to steal sacred objects and some dictionary definitions of the words are to the same effect, "does not commend itself to reason".

### III

#### Appellant is without standing to contest the validity of the statute.

Until now we have met the issues tendered by appellant head-on. There remains the question whether those issues are properly before the Court.

Appellant applied for, obtained and demands the right to retain, a license for the exhibition of the picture in question. Contending that the statute is wholly void, it nevertheless demands the protection which the statute affords from criminal prosecution and from the consequences of violation of local theater licensing requirements. As stated above, Section 1141 of the New York Penal Law, which makes it a crime to exhibit obscene pictures, specifically excludes motion picture films which have been licensed by the State Department of Education. In addition, by virtue of the license which appellant obtained and seeks to retain, it was rendered immune from action under the theater licensing provisions of the City of New York and of any other municipality in the state having such theater licensing requirements (*Burstyn v. McCaffrey, supra*, 198 N. Y. Misc. 884, 885). Thus appellant is in the position of contesting the validity of the statute, the benefits of which it sought, obtained and seeks to retain. This it may not do.

*Ashwander v. Tennessee Valley Authority*, 297

U. S. 288, 348;

*Fahey v. Mallonee*, 332 U. S. 245, 255.

In the Ashwander case, this Court said (p. 348) :

"The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

The Court of Appeals recognized this rule of law in its opinion in the instant case and, while considering that it was a bar to an attack upon the constitutionality of the statute *in toto*, nevertheless proceeded to a disposition of appellant's arguments upon the merits (R-156).

In addition, as we have already pointed out, there has in this case been no previous restraint—no prior censorship. Appellant, thus, is in no position to complain on that score, for it has not been injured by that provision of the statute. This Court will not, as it has said, "anticipate a question of constitutional law in advance of the necessity of deciding it". It will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied".

*Ashwander v. Tennessee Valley Authority, supra,*  
at pp. 346, 347.

*Anti-Fascist Committee v. McGrath, 341 U. S. 123,*  
at pp. 150-154.

**TICKETS NOW ON SALE AT BOX-OFFICE**

**PALACE** MONDAYS & TUESDAYS  
MAY 7-10-12-14-16-18-20  
ALL SEATS RESERVED

**BETTY HUTTON** IN PERSON AND ALL-STAR VARIETY SHOW

**NOW AT YOUR FAVORITE NEIGHBORHOOD THEATRE**

**ANOTHER BIG DOUBLE 'A' SHOW!**

**JANE RUSSELL**  
**VICTOR MATURE**  
**VINCENT PRICE**  
**HOAGY CARMICHAEL**

**'THE LAS VEGAS STORY'**

**Plus 2nd Feature**

**An Ocean of Fun!  
Gobs and Gobs  
of Laughter**

**GROUCHO MARX**  
**MARIE WILSON • WM. BENDIX**

**'A GIRL IN  
EVERY PORT'**

**ALBEE** FULTON & DRAZD  
1st & 2nd Showtimes

**MARLOES** BRANDO  
PETER

**'VIVA ZAPATA'**

**RKO**

**SKOURAS**

**81st ST**  
**COLISEUM**  
**MARINER**  
**23rd ST**  
**50th ST**  
**64th ST**  
**66th ST**  
**125th ST**  
**REGENT**  
**ALHAMBRA**

**FORWARD**  
**CHESTER**  
**FRANKLIN**  
**ROYAL**  
**CASTLE HILL**  
**MARBLE HILL**

**WESTCHESTER**

**MOUNT VERNON**  
**NEW ROCHELLE**  
**WHITE PLAINS**

**TONKEEED**

**BRONX**

**RENNMORE**  
**DYKHER**  
**PROSPECT**  
**TIL YOU**  
**OPIUM**  
**MADISON**  
**BUSHWICK**  
**GREENPOINT**

**QUEENS**

**ALDEN**  
**REGINA**  
**KEITH'S**  
**REGINA**  
**KEITH'S**  
**REGINA**  
**STRAND**  
**REGINA**

**RANDFORCE**

**SANDY**  
**STADIUM**  
**REPUBLIC**  
**EMBASSY**  
**AMBASSADOR**  
**WALKER**  
**STONE**

**Century**

**LODGE**  
**AVALON**  
**MARINE**  
**QUEENS**  
**MEADOWS**  
**QUEENS**  
**QUEENS VILLAGE**  
**SUNNYSIDE**  
**WOODSIDE**

**FLORAL**  
**LYNNBROOK**  
**GOVE**  
**FREEPORT**

**TRANS-LUX**

**"SHOCKING!"**

**"A great  
film!" — N.Y. Post**

**"The picture made  
outside the rules!  
Entirely intriguing**

**TONY'S TERRIFIC WITH TWO KINDS OF WOMEN**

**FLESH AND FURY**

**starring**

**TONY CURTIS · JAN STERLING · MONA FREEMAN**

**LOEW'S STATE**

**B'way & 45th St.**

**LOEW'S**

**METROPOLITAN JERSEY CITY NEWARK STATE**

**SALES TO SPRING**

**3rd THRILLING WEEK! CONTINUOUS SHOWINGS!**

**8-9-10  
Romantic Spectacle!**

**QUO VADIS**  
Some of Your Neighborhood!  
LOEW'S THEATRE

**Color By TECHNICOLOR**

**She Destroyed Those Who Dared To Love Her!**

**James Mason · Ava Gardner**

**MGM's PANDORA AND THE FLYING DUTCHMAN**

**TECHNICOLOR and FRATERNITY SCANDALS EXPOSED**

**FOR MEN ONLY** and Women too!

**PAUL HENREID · Kathleen Hughes**

**BRONX QUEENS**

**PARADISE VALENCIA**

**MANHATTAN BROOKLYN**

**72nd STREET 61st STREET**

**83rd STREET 73rd STREET**

**175th STREET CANAL**

**COMMODORE DELANCEY**

**INWOOD LEXINGTON**

**LEXINGTON OLYMPIA**

**ORPHEUM RIO**

**SHERIDAN VICTORIA**

**116th STREET 116th STREET**

**MT. VERNON NEW ROCHELLE**

**WH. PLAINS YONKERS**

**AMERICAN BOULEVARD BURNSIDE FAIRMOUNT GRAND NATIONAL 16TH STREET POST ROAD**

**HILLSIDE PLAZA PROSPECT WILLARD BROOKLYN PALACE**

**EXTRA! TOM AND JERRY M-G-M TECHNICOLOR CARTOON**

**Action! Fury! Passion!**

**MUTINY**

**TECHNICOLOR**

**starring**

**MARK STEVENS ANGELA LANSBURY**

**RELEASED THRU UNITED ARTISTS**

**LOVE! HATE! MURDER!**

**The BIG NIGHT**

**JOHN BARRYMORE, JR.**

**TRIBORO WARWICK**

**BORO PARK NEW UPTOWN AV.**

**APOLLO 126 EAST 37th STREET**

**AVENUE B 2nd PARK STREET**

**BAY RIDGE 74th BETHNY**

**BEDFORD 8th BIRCH Street**

**86th STREET 10th AVENUE**

**SPOGNER 10 W. 47th Street**

**VICTORY 11th AVENUE**

**ELSMERE 10 W. 68th Street**

**'DEATH of a SALESMAN'**

**and HARLEM GLOBETROTTERS**

**CARY GRANT-BETSY DRAKE**

**'ROOM for ONE MORE'**

**IDA LUPINO-ROBERT RYAN**

**ON DANGEROUS GROUNDS**

**King Solomon's Mines**

**& The Returner and the Reindeer**

## **APPENDIX B**

**RADIO CITY**  **MUSIC HALL**

Showplace of the Nation Rockefeller Center

**"TOPS IN TOWN!"** —Hale, News

**"SPARKLING! A shower of fun and frolic!"** —Gaines, Herald-Tribune

**"FRESH and cheerfull Music, dance, color in riotous abundance!"** —Cawelti, Times

**"HILARIOUS ... bountiful entertainment!"** —Cook, World-Telegram & Sun

**"HAPPY entertainment... something to sing about!"** —Pawlak, Journal-American

**"FINE fun... you'll relish every morsel!"** —Horn, Post

**"SUPERB! Delightfully amusing. Get to the Music Hall!"** —Quinn, Mirror

**"Glory of Easter"**  
Beautiful, far-famed Cathedral pageant... produced by Leonidoff... with Gertrude Lockway, contralto, Choral Ensemble, Grand Organ and Symphony Orchestra directed by Raymond Paige... and

**"Spring Song"**  
Celebrating Springtide frolics and finery... settings by James Stewart Morcom... the first American theatre appearance of the Andrea Dancers, Continental sensation... Patricia Drylie, ballerina, and the Corps de Ballet in delightful divertissement, choreography by Florence Rogge... the New York debut of Edward Ruhl, opera tenor find... the famed Rockettes in glamorous precision by Russell Markert... breath-taking novelty by Bela Kremo... and a fascinating fashion show presenting latest Spring creations by leading designers.

**SINGIN' IN THE RAIN**  
COLOR BY  
*Technicolor*

**JOSÉ FERRER**  
—PEHLBERG-SEATON production

**ANYTHING CAN HAPPEN**  
Co-starring  
**KIM HUMBERT**

**Gene KELLY · DONALD O'CONNOR · DEBBIE REYNOLDS**  
—JEAN HAGEN · MILLARD MITCHELL · CYD CHARISSE · ROBERT MITCHUM · ROBERT STIGGINS · ROBERT WAGNER · ROBERT WILSON · ROBERT YOUNG · ROBERT ZEMMER

**Hours open**  
Today and  
Friday  
10:00 A. M.  
Picture at:  
10:25, 1:30,  
4:22, 7:33, 10:15  
Stage Show at:  
12:15, 3:30,  
6:31, 9:26

**PREVIEW TODAY**

Come anytime between 12: Noon and 8:30 P. M. for a preview of **"WITH A SONG IN MY HEART"** plus our regular stage & screen shows. **REGULAR PERFORMANCES START TOMORROW.** Doors Open 10:30 AM

**ROXY**



## Conclusion

Freedom of speech and the press has never protected or sanctioned the obscene, indecent, sacrilegious. Certainly, the Constitution, which purposes also to insure religious liberty, is not to be converted into a weapon for its destruction and a shield of protection to those who would revile all religion or some religion; in order to provide profit for the destroyers in pandering to the lowest tastes in amusement (Cf. *Hannegan v. Esquire, supra*, 327 U. S. at p. 158). We are, as this Court said in *Church of the Holy Trinity v. United States*, 143 U. S. 457, 465:

"\* \* \* a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation."

It is axiomatic that no single constitutional right is limitless. Constitutional rights are necessarily limited by each other. It is submitted that the New York statute, when it denies licenses for the exhibition of obscene, indecent, sacrilegious motion pictures properly expresses the natural balance between the right to present motion picture films for amusement and entertainment, at a profit, and the right of the public to enjoy the freedom of religion guaranteed by our Constitution.

The advances in science that have brought blessings in comfort, luxury and entertainment have also brought problems for and responsibilities of regulation that the simpler unmechanized days of yesteryear did not present. The automobile and airplane require prior licensing, the establishment of traffic rules and of airlines, that were unnecessary in the day of the horse and buggy. The driver of the horse-drawn vehicle who left his horse untethered to run away or who recklessly charged into a crowd could be dealt with after the fact for his solo breach. So as to "mass com-

munications" the exhibition of motion pictures has brought the need for "traffic rules" so to speak that are unnecessary when the communication is that of one man.

"The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life." (*Breard v. Alexandria*, 341 U. S. 622 (1951), p. 642.)

In any event, this appellant has no standing to challenge the constitutionality of the statute (*supra*, point III).

**The order and judgment of the Court of Appeals should be affirmed.**

Dated: April 14, 1952.

Respectfully submitted,

WENDELL P. BROWN  
Solicitor General

RUTH KESSLER TOCH  
Assistant Attorney General  
*Of Counsel*

JOHN P. JEHU  
ELIZABETH M. EASTMAN  
GEORGE B. FARRINGTON  
*Of Counsel*

NATHANIEL L. GOLDSTEIN  
Attorney General of the State  
of New York  
State Capitol  
Albany, New York

CHARLES A. BRIND, JR.  
*Counsel to the Board of Regents  
of the University of the State  
of New York and State Educa-  
tion Department*  
Education Building  
Albany, New York  
*Attorneys for Appellees*

## APPENDIX A

### Education Law of the State of New York (Revised C. 820, L. 1947)

#### ARTICLE 3

##### Education Department

• • •

##### PART II

##### MOTION PICTURE DIVISION

**§ 120. Motion picture division continued; organization.**

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

**§ 121. Local offices and bureaus.** The regents may authorize the establishment and maintenance of officers and bureaus for the reception and examination of films and for the transaction of the business of the division in such places as efficiency, economy and the public interests require.

**§ 122. Licenses.** The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.

**§ 123. Permits.** 1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

2. **Scientific and educational films.** Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof, either personally or by

his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

**§ 124. Review by regents.** An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall be reviewable by a proceeding under article seventy-eight of the civil practice act at the instance of the applicant.

**§ 125. Permits revocable.** Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such director or authorized officer only in the manner provided for license.

**§ 126. Fees.** The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a fee of three dollars for each one thousand feet or fraction thereof of original film and two dollars for each additional copy thereof licensed or permitted by him. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return

of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York.

**§ 127. Applications.** No license or permit shall be issued for any film unless and until application therefor shall be made in writing in the form, manner and substance prescribed by the education department, and accompanied by the required fee. Such application shall immediately be given a serial number which shall by the producer, owner or applicant be made a permanent part of the principal title portion of the corresponding film and every copy thereof for which the permit or license is applied, in such style and substance as such department shall prescribe.

**§ 128. Licenses and permits void.** Any license or permit issued upon a false or misleading affidavit or application shall be wholly void *ab initio*. Any change or alteration in a film after license or permit, except the elimination of a part or except upon written direction of the director or authorized officer of such division, shall be a violation of this article and shall also make immediately void the license or permit therefor. A conviction for a crime committed by the exhibition or unlawful possession of any film in the state of New York shall *per se* revoke any outstanding license or permit for said film and such director or authorized officer shall cause notice thereof to be sent to the applicant or applicants.

**§ 129. Unlawful use or exhibition.** It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the

education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

**§ 130. Posters, banners, et cetera.** No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such a character that its exhibition would tend to corrupt morals or incite to crime. If such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition, it shall be sufficient ground for the revocation of any permit or license issued by the education department.

**§ 131. Penalty.** A violation of any provision of part two of this article shall be a misdemeanor.

**§ 132. Enforcement; rules and regulations.** The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace office in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations.

LIBRARY  
~~SUPREME COURT, U.S.~~

# Supreme Court of the United States

OCTOBER TERM 1951—No. 522

JOSEPH BURSTYN, INC.,

*Appellant,*

—against—

LEWIS A. WILSON, Commissioner of Education  
of the State of New York, et al.,

*Appellees.*

---

## BRIEF OF NEW YORK STATE CATHOLIC WELFARE COMMITTEE, *AMICUS CURIAE*

---

CHARLES J. TOBIN

*Attorney for the New York State  
Catholic Welfare Committee  
100 State Street.  
Albany, N. Y.*

EDMOND B. BUTLER  
PORTER R. CHANDLER  
PATRICK C. DUGAN  
GEORGE A. TIMONE  
FREDERICK G. WATSON

*Of Counsel.*

## INDEX

	PAGE
The Prior Proceedings .....	1
Before the Regents of the State of New York .....	2
Before the New York State Courts .....	4
The Facts .....	4
Summary of Argument .....	10
 <b>POINT I</b>	
The New York statute is not a law abridging freedom of speech or of the press .....	11
 <b>POINT II</b>	
The statute is neither vague nor indefinite nor is it a law respecting the establishment of religion .....	15
 <b>POINT III</b>	
The statute is not a law prohibiting the free exercise of religion .....	20
 <b>POINT IV</b>	
In any event appellant is estopped to attack the constitutionality of the statute .....	27
CONCLUSION .....	29

## CASES CITED

PAGE

Barnette v. Board of Education, 319 U. S. 624 .....	18
Burstyn v. McCaffrey, N. Y. Law Journal, Jan. 8, 1951, p. 77, col. 1 .....	2, 14, 27
Cantwell v. Connecticut, 310 U. S. 296 .....	23
Cox v. New Hampshire, 312 U. S. 569 .....	23
Eureka Productions, Inc. v. Lehman, 304 U. S. 541 .....	12
Everson v. Board of Education, 330 U. S. 1 .....	18
Fahey v. Mallonee, 332 U. S. 245 .....	27
Kevacs v. Cooper, 336 U. S. 77 .....	12
Kunz v. New York, 340 U. S. 290 .....	13, 25, 26
Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230 .....	12
Niemotko v. Maryland, 340 U. S. 268 .....	26
Pathé Exchange, Inc. v. Cobb, 202 App. Div. 450; affd. 236 N. Y. 539 .....	2n, 12
Radio Corporation of America v. United States, 341 U. S. 412 .....	12
RD-DR Corporation v. Smith, 183 Fed. 2d 562; cert. den. 340 U. S. 853 .....	13
State v. Mockus, 120 Me. 84; 113 Atl. 39; 14 A. L. R. 871 .....	21

## OTHER AUTHORITIES

	PAGE
Constitution of the State of New York, Art. 5 § 4; Art. 11 § 2 .....	2n
Education Law of New York §§ 120-132 .....	2n
Education Law of New York § 122 .....	3n, 11, 15
Education Law of New York § 123 .....	11
Education Law of New York § 124 .....	26
Funk & Wagnall's New Standard Dictionary (1937 edi- tion) .....	4
Laws of New York, 1921, c. 715 .....	2n
Laws of New York, 1926, c. 544 .....	2n
Laws of New York, 1927, c. 153, § 29 .....	2n

# Supreme Court of the United States

OCTOBER TERM 1951—No. 522

JOSEPH BURSTYN, INC.,

*Appellant,*

—against—

LEWIS A. WILSON, Commissioner of Education  
of the State of New York, *et al.*,

*Appellees.*

---

## BRIEF OF NEW YORK STATE CATHOLIC WELFARE COMMITTEE, *AMICUS CURIAE*

The New York State Catholic Welfare Committee represents the seven Catholic dioceses of the State of New York, in which there are over four million Catholics. The parties to this appeal have consented to the filing of this brief. By leave of the Appellate Division and of the Court of Appeals, this Committee filed briefs in both those Courts in support of the Appellees' position.

### The Prior Proceedings

When "The Miracle" was publicly shown in New York City in December 1950, the License Commissioner of the City held that the picture was blasphemous and threatened to revoke the license of the Paris theater, where it was showing. The licensee Joseph Burstyn, Inc. sued to enjoin cancellation of the theater license. The court granted an injunction, and held that the City License Commissioner was without power to act, saying:

"The right to determine whether a motion picture is indecent, immoral or sacrilegious is vested solely and exclusively in the education department of the

state." (*Burstyn v. McCaffrey*; Steuer, J., Special Term, Part III, New York County, N. Y. Law Journal, Jan. 8, 1951, p. 77, col. 1.)

The court further pointed out that the Legislature had recently forbidden criminal prosecution of any licensed motion picture (L. 1950, ch. 624). The court then sharply pointed to the only remedy of any or all of the citizens of the state where a license has been issued erroneously:

"\* \* \* any individual can seek to have the Board of Regents revoke its permit if he can show that the license was granted through an abuse of power he will find the court just as ready to relieve against such an abuse as it is to restrain this one."

### **Before the Regents**

In reliance on this decision, pointing to the appropriate remedy, and in view of continued public protests, the Regents on their own motion appointed a committee of three of their members to view the picture and report. The committee reported (R. 49):

"Soon after the showing of this picture at the Paris Theatre in New York City, the Education Department was fairly flooded with protests against its public exhibition."

\* The Board of Regents of the University of the State of New York, which has had continuous existence since 1784, is the head of the State Department of Education (New York Constitution, Art. 5, Sec. 4; cf. Art. 11, Sec. 2).

The licensing of motion pictures in New York was originally required by Laws of 1921, Ch. 715, sustained as constitutional in *Pathé Exchange, Inc. v. Cobb*, 202 App. Div. 450 (3rd Dept. 1922), aff'd 236 N. Y. 539 (1923). The original statute created a licensing body called "The Motion Picture Commission." This Commission was abolished in 1926, and its functions were transferred to the Education Department under the control of the Regents (L. 1926, Ch. 544; L. 1927, Ch. 153, § 29; cf. N. Y. Education Law, §§ 120-132).

The committee went on to report that having viewed the picture "in their opinion there was basis for the claim that the picture was sacrilegious".\* The Regents then ordered a hearing in New York City at which the licensees were directed to show cause why the licenses should not be rescinded and cancelled (R. 27).

At the hearing before the committee of the Regents on January 30, 1951, the appellant, Joseph Burstyn, Inc., appeared specially by counsel, challenged the jurisdiction of the Board of Regents and of the committee on the ground of bias and lack of power or authority to proceed, and without attempting to meet the merits of the controversy, withdrew from further participation in the hearing. Joseph Burstyn, who is the sole stockholder of the appellant, individually appeared by counsel and submitted an affidavit and numerous exhibits. Opponents of the film were limited to the submission of briefs. The committee of the Regents reported in favor of the jurisdiction and authority of the Regents and recommended that the Regents, as a Committee of the Whole, view the motion picture in question.

The Board of Regents, at their meeting in Albany on February 16, 1951, received the report of their committee, and having themselves viewed the picture, unanimously found it to be sacrilegious and cancelled and rescinded the licenses previously issued.

---

\* New York Education Law, § 122, provides that a license shall be issued for any motion picture film

"unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime."

## Before the New York State Courts

The appellant thereupon brought a proceeding in the nature of mandamus under Article 78 of the New York Civil Practice Act against the Regents, to compel the restoration of the licenses. Pursuant to statute, this petition came on for hearing in the first instance before the Appellate Division, Third Department. The Justices of the Appellate Division viewed the picture. On May 9, 1951, they unanimously sustained the action of the Regents (R. 87, 88; 278 App. Div. 253). The appellant then appealed to the Court of Appeals. The Judges of that Court also viewed the picture. By a vote of 5 to 2 they affirmed the order of the Appellate Division (R. 144-172; 303 N. Y. 242).

### The Facts

The majority opinion in the Court of Appeals accepted the definition of "sacrilegious" given in Funk & Wagnalls' New Standard Dictionary (1937 edition) as "The act of violating or profaning anything sacred" and held the words "sacrilegious" and "profane" to be synonymous (303 N. Y. at p. 255). The concurring opinion of Judge Desmond said (303 N. Y. at p. 263):

"Of course, some of the meanings of 'sacrilegious' have no possible application to a motion picture, but, according to all the dictionaries and common English usage, the adjective has one applicable meaning, since it includes violating or profaning anything held sacred (see Oxford Dictionary, Vol. 8, pp. 18-19; Webster's New International Dictionary [2d ed.], unabridged, p. 2195; Black's Law Dictionary [deluxe ed.], p. 1574.)"

These definitions indicate that the license shall not be issued if the film profanes sacred things.

Million of citizens of the State of New York—Catholic and non-Catholic alike—believe and revere as sacred truths related in the Holy Gospels that Jesus Christ is the Son of God, born of the Virgin Mary, who is referred to as the Blessed Virgin; that she was married to St. Joseph; that she conceived Jesus through the direct intervention of God, the Holy Ghost, and that she remained, before and after conception, a Virgin.

We quote from the Bible (Gospel according to St. Matthew, Chapter I, Verses 18-25):

*Protestant*  
(King James Version)

18. Now the birth of Jesus Christ was on this wise: When as his mother Mary was espoused to Joseph, before they came together, she was found with child of the Holy Ghost.

19. Then Joseph her husband, being a just man, and not willing to make her a publick example, was minded to put her away privily.

20. But while he thought on these things, behold, the angel of the Lord appeared unto him in a dream, saying, Joseph, thou son of David, fear not to take unto thee Mary thy wife: for that which is conceived in her is of the Holy Ghost.

*Catholic*  
(Douay Version)

18. Now the generation of Christ was in this wise. When as his mother Mary was espoused to Joseph, before they came together, she was found with child, of the Holy Ghost.

19. Whereupon Joseph her husband, being a just man, and not willing publicly to expose her, was minded to put her away privately.

20. But while he thought on these things, behold the Angel of the Lord appeared to him in his sleep, saying: Joseph, son of David, fear not to take unto thee Mary thy wife, for that which is conceived in her, is of the Holy Ghost.

*Protestant*

(King James Version)

21. And she shall bring forth a son, and thou shalt call his name JESUS: for he shall save his people from their sins.

22. Now all this was done, that it might be fulfilled which was spoken of the Lord by the prophet, saying,

23. Behold, a virgin shall be with child, and shall bring forth a son, and they shall call his name Emanuel, which being interpreted is, God with us.

24. Then Joseph being raised from sleep did as the angel of the Lord had bidden him, and took unto him his wife:

25. And knew her not till she had brought forth her firstborn son: and he called his name JESUS.

*Catholic.*

(Douay Version)

21. And she shall bring forth a son: and thou shalt call his name Jesus. For he shall save his people from their sins.

22. Now all this was done that it might be fulfilled which the Lord spoke by the prophet, saying:

23. Behold a virgin shall be with child, and bring forth a son, and they shall call his name Emmanuel, which being interpreted is, God with us.

24. And Joseph arising up from sleep, did as the angel of the Lord had commanded him, and took unto him his wife.

25. And he knew her not till she brought forth her firstborn son: and he called his name Jesus.

See also St. Luke, ch. I, verses 26-38.

"The Miracle" tells the story of a demented peasant girl who meets a bearded stranger who she thinks is St. Joseph. This stranger first makes her drunk and then seduces her. The seduction scene leads up to a blackout in the film, during which actual sexual intercourse and conception are supposed to occur.

To make the point abundantly clear, this seduction scene is accompanied by both a voice and English sub-titles which make shocking reference to the above quoted Biblical passages on the conception of Jesus Christ. We quote from the "voice" in the film-script (R. 67), which is repeated in the English sub-titles on the screen (R. 83):

" \* \* \* An angel of the Lord appeared to him in a dream and said . . . Joseph, son of David, have no fear to take Mary as your bride . . . for what is being conceived in here \* \* \*

Then follows the blackout. Because of her drunken condition she believes conception was accomplished miraculously and without carnal relations. Her belief is told to fellow townspeople who stage a mock religious procession in her honor. The girl is dressed in clothes caricaturing those worn in church processions honoring the Virgin Mary, and an old wash basin is placed on her head to resemble a crown. Flowers are strewn in her path, while the people sing a well-known hymn ("Evviva Maria") in honor of Mary and the Deity (R. 76). The child she is carrying is addressed by the girl as "Blessed Son" and "My God" (R. 76). The film concludes with a realistic portrayal of her labor pains, and the birth of her child in the precincts of a church.

"The Miracle" thus presents a brutal mockery of what Catholics and Protestants alike revere as a most sacred event, the conception and birth of Jesus Christ.

## The Appellant's Statement of Facts is Incomplete in Important Particulars

In the light of the facts as found by the Regents and by both Courts below, there seems no justification for the manifestly incomplete description of the picture at pages 3 and 4 of Appellant's brief. The Special Committee of Regents, the Regents, the Appellate Division and the Court of Appeals all viewed the film in question and all made substantially the same findings. The appellant seems not to appreciate that these findings are binding on it at this stage of the appeal. The Court of Appeals stated the facts clearly (R. 152) :

"We have all viewed the film in question. The so-called exhibits, which are simply unsworn communications expressing personal opinions, are of little help to us. The principal basis for the charge of sacrilege is found in the picture itself, the personalities involved, the use of scriptural passages as a background for the portrayal of the characters, and their actions, together with other portions of the script and the title of the film itself. It is featured as a 'way of love'. At the very outset, we are given this definition: 'ardent affection, passionate attachment, men's adoration of God, sexual passion, gratification, devotion'.

While the film in question is called 'The Miracle', no miracle is shown; on the contrary, we have the picture of a demented peasant girl meeting a complete stranger whom she addresses as 'Saint Joseph'. At the very beginning of the script, reference is made to 'Jesus, Joseph, Mary'. 'Saint Joseph' first causes her to become intoxicated. Scriptural passages referring to the Holy Sacrament (Luke 22:19), and to the nativity of Christ (Matthew 1:20), are freely employed imme-

diately after she states she is not well. A blackout in the film, in its association with the story, compels the inference that sexual intercourse and conception ensue. 'Saint Joseph' abandons her immediately following the seduction, she is later found pregnant, and a mock religious procession is staged in her honor; she is 'crowned' with an old washbasin, is thrown out by her former lover, and the picture concludes with a realistic portrayal of her labor pains and the birth in a church courtyard of her child, whom she addresses as 'my blessed son, My holy son'.

Christ is the heart and core of the Christian faith. Two personalities most closely related to Him in life were His mother, Mary, and Joseph. They are deeply revered by all Christians. Countless millions over the centuries have regarded their relationship as sacred, and so do millions living to day. 'The Miracle' not only encroaches upon this sacred relationship and the Biblical presentation thereof in respect to the birth of Christ, but utterly destroys it, associating it, as the Regents found, 'with drunkenness, seduction, mockery and lewdness', and, in the language of the script itself, with 'passionate attachment \* \* \* sexual passion' and 'gratification', as a way of love."

The showing of this film "provoked an immediate and substantial public controversy; and the Education Department was fairly flooded with protests against its exhibition" (R. 145; *cf.* R. 49). None of these communications of disapproval are in the transcript of record before this Court. We regard this omission as proper. Material of this nature would not be admissible in a trial court of first instance. Much less do they have pertineney on this appeal. Not-

withstanding this the appellant has printed a large number of excerpts from comments favorable to the film.

These, of course, are *ex parte* unsworn communications. It seems probable from the number of names affixed to some of them that signatures were solicited in the fashion of nominating petitions. The Court of Appeals properly referred to them as "so-called exhibits", and found that they were "of little help", (R. 152).

This practice seems a distortion of the use of expert testimony. We doubt that this Court will find these communications any more "helpful" or relevant than did the Court of Appeals.

### **Summary of Argument**

Three questions of law, we submit, are involved on the present appeal. They are these:

1. Is it an unconstitutional violation of freedom of speech for any State to provide for any type of inspection and prior licensing of motion picture films exhibited for profit? Appellant insists that all such systems are of necessity unconstitutional, and that no State may, by a licensing system, forbid the showing of any film, no matter how obscene, immoral or otherwise objectionable. We submit that there is nothing in the Constitution of the United States which requires any such result.

2. Is it an unconstitutional "establishment of religion" to deny a license for the public showing for profit of a film which associates the most sacred beliefs of millions of citizens with "drunkenness, seduction, mockery and lewdness"? We submit that it is not.

3. Is the appellant, by having submitted voluntarily to the licensing requirements of the statute, and by bringing the present proceeding to compel the restoration of the license originally issued, estopped to attack the constitutionality of the statute the protection of which it seeks to invoke? We submit that appellant is thus estopped.

### **POINT I**

#### **The New York statute is not a law abridging freedom of speech or of the press.**

The very statute here under attack specifically provides (N. Y. Education Law, § 123) for exemption from prior licensing and censorship of motion pictures whose natural object is the dissemination of ideas,—i.e. films of current events, of scientific and educational character, and for religious, charitable and educational purposes. (*cf.* Opinion below, 303 N. Y. at p. 258)

The picture here in question, however, was obviously designed not for the dissemination of ideas and presentation of serious argument (as indeed appellant admits here) but for entertainment in a place of amusement for profit. It was precisely because of appellant's own recognition of this obvious fact that the film was submitted for prior review and licensing as a commercial spectacle under Section 122 of the New York Education Law and that no attempt was made to obtain, under Section 123, a simple permit (issued without prior examination) for its exhibition as a scientific, religious or educational film.

Whatever may be argued pro or con as to a claim of unrestrained right to exhibit "documentary" films, that question has no bearing on this appeal. The propriety of re-

straints in respect of entertainment spectacles in public places of amusement for private gain is not novel either in the Courts of New York or in this Court.

The original statute in New York, from which the statute here in question was derived almost *in haec verba*, was unanimously sustained in *Pathé Exchange v. Cbbb*, 202 App. Div. 450, affd. 236 N. Y. 539.

In reaching their decision in that case the New York Courts relied upon the unanimous decision of this Court in *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U. S. 230 (1914).

Appellant now argues that the *Mutual Film Corporation* case is no longer law. Indeed appellant goes so far as to assert that any and all requirements for the licensing of talking motion pictures are now unconstitutional.

But as recently as 1938, this Court unanimously gave judgment *per curiam* on the authority of the *Mutual Film Corporation* case in *Eureka Productions, Inc. v. Lehman*, 304 U. S. 541.

And in 1949 in *Kovacs v. Cooper*, 336 U. S. 77 (repeatedly cited with approval in Appellant's Brief), Mr. Justice Frankfurter in his concurring opinion at page 96 said:

"Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated. *Mutual Film Corporation v. Industrial Commission*, 236 U. S. 230."

And in the color television case (*Radio Corporation of America v. United States*, 341 U. S. 412, 1951), Mr. Justice Frankfurter in his separate opinion said (341 U. S. 425-6):

"Man forgets at terrible cost that the environment in which an event is placed may powerfully determine

its effect. Disclosure conveyed by the limitations and power of the camera does not convey the same things to the mind as disclosure made by the limitations and power of pen or voice. The range of presentation, the opportunities for distortion, the impact on reason, the effect on the looker-on as against the reader-hearer, vary; and the difference may be vital. Judgment may be confused instead of enlightened. Feeling may be agitated, not guided; reason deflected, not enlisted. Reason—the deliberative process—has its own requirements, met by one method and frustrated by another."

In fact in 1950 a motion picture producer attempted to argue, as Appellant now does, that the *Mutual Film* case is no longer law and that film licensing is unconstitutional. The attempt was unsuccessful. *RD-DR Corporation v. Smith*, 183 F. 2nd 562 (C. A. 5th), cert. den., 340 U. S. 853.

We must bear in mind that, as stated by this Court in *Kearacs v. Cooper*, 336 U. S. 77, 85: "even the fundamental rights of the Bill of Rights are not absolute".

Wholly apart from motion pictures and in the realm of the individual living voice, this Court has been careful when striking down restrictive statutes to point out that the states are not powerless to protect the public peace and order from highly inflammatory and provocative speech without waiting for the probable breach of the peace to occur. In spite of this, Appellant attempts to read into this Court's decision in *Kunz v. New York*, 340 U. S. 290, a holding that anyone may with impunity flagrantly deride the religious beliefs of others,—even in a spectacle exhibited purely for commercial gain. Similarly in other cases cited, Appellant lifts the occurrence out of context and fails

to observe that the decisions related to statutes which the Court found to be lacking in standards appropriately connected with the protection of public peace and order.

The statute here, however, requires no such speculation as this Court found objectionable in the ordinance involved in the *Kunz* case. By the time a motion picture has been produced the words have been spoken, the gestures made, the expression completed. There is no need for speculation as to what they are or will be. Both can be determined by simple observation of what they have been. If what has been done may be punished as an abuse of constitutional right, can it be said that its repetition again and again may not be constitutionally restrained?

As the law of New York now stands, the exhibitor of a film which has received a license is *ipso facto* exempted from prosecution for showing it, as was pointed out by the court in the prior proceeding involving this same film (*Burstyn v. McCaffery*, cited *supra*, p. 2). It was presumably with this factor in mind that appellant obtained a license in the first instance and later brought the present proceeding to compel that license to be restored. Indeed, we may question whether appellant, in the absence of any licensing requirements, would not strenuously contend that the exhibition of this particular film is protected against prosecution by the same constitutional guaranties which it now invokes. But even if this were not so, the logic of appellant's position would leave the community powerless to prevent repeated exhibitions of a film advocating overthrow of the government by force and calculated to incite to riot, or repeated exhibitions of a film unquestionably obscene, although each new fanatic exhibitor could be prosecuted. We submit there is nothing in the Constitution to compel any such result.

## POINT II

**The statute is neither vague nor indefinite, nor is it a law respecting the establishment of religion.**

Section 122 of the New York Education Law forbids the issuance of a license for the exhibition for profit of a film which is "obscene, indecent, immoral, inhuman, sacrilegious, or is of such character that its exhibition would tend to corrupt morals or incite to crime".

The Regents are peremptorily required by the same statute to grant a license to every film which does not fall within one or more of the categories named.

On this branch of the argument, appellant asserts that it is constitutionally improper in any event to include "sacrilegious" among the proscribed categories, *first* because the word is said to be fatally indefinite, and *second* because its application is said to require the formulation of a religious judgment and therefore constitutes an establishment of religion.

The individual categories prohibited have been quite properly construed by the New York courts in the light of the general definitive phrases associated with them. These clearly disclose that the object and intent of the statute is the protection of the public welfare and not, in any sense, the establishment either of a particular religion or of religion generally. By the inclusion of "sacrilegious" among the categories considered likely to offend against public decency and order, the statute simply expresses the awareness by the Legislature of the fact of historical human experience, often noted by this Court, that religious beliefs are held not simply as a matter of cold intellectual

judgment, but as well, by many adherents, with an emotional intensity which can, and in the past often has, led to violent action in their defense.

On the question as to the alleged indefiniteness of the term "sacrilegious", after quoting dictionary definitions, the Court of Appeals said (303 N. Y. at pp. 255-6) :

"There is no difficulty in recognizing the limits of the criterion thus established; and the courts have had no problem either with the word 'sacrilegious' or with its synonym, 'profane'.

In *Mutual Film Corp. v. Hedges*, (236 U. S. 248, *supra*), the contention that there was an invalid delegation of legislative power was rejected where the statute provided that the censor should approve such films as were found to be 'moral and proper and disapprove such as are, *sacrilegious*, obscene, indecent or immoral, or such as tend to corrupt the morals' (p. 257, emphasis supplied). In *Winters v. New York* (333 U. S. 507, 510) it is stated that publications are 'subject to control if they are lewd, indecent, obscene or profane' (emphasis supplied). In *Chaplinsky v. New Hampshire* (315 U. S. 568, 571-572) Mr. Justice Murphy declared for a unanimous court: 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the *lewd and obscene*, the *profane*' (emphasis supplied). Indeed, Congress itself has found in the word 'profane' a useful standard for both administrative and criminal sanctions against those uttering profane language or meaning by means of radio (*Dumont Laboratories v. Carroll*, 184 F.2d 153, 156, certiorari denied 340 U. S. 929; U. S. Code, tit. 18, § 1464; see, also, Penal Law, § 2072)."

Or as Judge Desmond said in his concurring opinion (303 N. Y. at p. 263):

"‘Sacrilegious’, like ‘obscene’ (see *Winters v. New York*, 333 U. S. 507), is sufficiently definite in meaning to set an enforceable standard. That men differ as to what is ‘sacrilegious’ is beside the point—there is nothing in the world which all men everywhere agree is ‘obscene’, yet obscenity laws are universally enforced."

Appellant, however, insists further that the administration of the statute requires the formulation by the Regents of a religious judgment and that this converts it into a “law respecting an establishment of religion.” The Court of Appeals disposed of this argument in these words (303 N. Y. at p. 258):

Nor is it true that the Regents must form religious judgments in order to find that a film is sacrilegious. As hereinbefore indicated, there is nothing mysterious about the standard to be applied. It is simply this: That no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule to the extent that it has been here, by those engaged in selling entertainment by way of motion pictures. As the court below said of the statute in question, ‘All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom’ (278 App. Div. 253, 258.)”

This conclusion, we submit, was entirely sound. The Regents were not required by the law to usurp the function of religious authority by rendering a religious judgment

as to what is or is not, theologically speaking, "sacrilegious". The only judgment necessary was a judgment of the fact that reasonable persons within the State of New York believe a given proposition to be true and hold that belief as a matter of religious conviction. This is not a judgment on matters of theology. It is a judgment of an ascertainable fact in the life of the community.

Moreover it is a judgment of the type that this Court is frequently called upon to make in order to enforce the constitutional ban on laws prohibiting the free exercise of religion, e.g., a judgment that a group of citizens are banded together in a common religion which holds as one of its tenets that a salute to the flag is an act of religious idolatry. *Barnette v. Board of Education*, 319 U. S. 624, 629.

Another branch of appellant's argument under this point may be summarized as follows:

Every law which "aids all religions" is a law respecting an establishment of religion.

The statute in question "aids all religions".

Therefore it is unconstitutional.

The defect in this argument lies in exaggeration beyond plain intent and subsequent application of the words of Mr. Justice Black quoted at page 41 of Appellant's Brief:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

The very case in which the words were first used (*Everson v. Board of Education*, 330 U. S. 1, 15, 17) limited their application and refused to apply them to a statute

which indirectly afforded aid to all religions. The ban on laws which "aid all religions" can be constitutionally supported only where the aid is direct and imposes a real and appreciable burden upon the citizen. Attempts to lift these words from context and apply them *simpliciter* can only plague this Court with an endless series of controversies. For, if the words are to be so applied (and we think they are not), then by them the religious freedom clause of the First Amendment has been set at irreconcilable war with itself. That clause, by placing the power and authority of the nation behind the guaranty of free exercise of religion, itself most cogently "aids all religions".

At page 31 of its brief appellant quotes this question from the dissenting opinion below:

" \* \* \* At what point, \* \* \* (does) a questioning of particular religious dogma take on the aspect of 'sacrilege' ? "

To this we answer—At no point. We would zealously guard the constitutional right of anyone in this country, without interference from the civil authority, to "question" a dogma of any religious faith, including our own. Nor is that right in any way involved or challenged here.

In the present case there is no warrant for appellant's assertion (Br. p. 42) that the effect of the action of the Regents was "to impose the religious views of a minority upon all the citizens of the state". Neither the Regents nor the New York Courts have attempted to decree that anyone must accept or subscribe to any religious views concerning the Nativity of Christ. They have simply enforced a moderate statutory limitation on the means by which a caricature of those views may be expressed in an entertainment spectacle exhibited for profit in a public place of amusement.

The action, we submit, was neither a definition, an endorsement nor an imposition of any particular belief, or of any belief, respecting the Birth of Christ. It was far less significant than the long established recognition by Congress and state legislatures of Christmas as a legal holiday in every state, territory and possession of the United States. Yet we do not suppose that anyone would attempt to destroy the statutes by which this recognition is granted upon the claim that they constitute a religious judgment by the civil authority, or that they impose on citizens religious beliefs concerning the event recalled by the celebration of that day.

### **POINT III**

#### **The statute is not a law prohibiting the free exercise of religion.**

Just what religious motives appellant had in exhibiting for profit at the Paris Theatre, in the height of the Christmas season, a foul travesty of Christ's Nativity, is something which appellant does not venture to explain. In any event, the argument that a sacrilegious film occupies a specially privileged constitutional position, and that any interference with its exhibition is a restraint of religious freedom, is wholly without merit. Indeed, we may properly inquire how far appellant and those who support it are prepared to push that argument. We assume that even appellant may concede that an indecent film can be barred from public showing for profit. We assume that there would have been at least a reasonable basis for barring as indecent this particular portrayal of the seduction of a drunken halfwit. But if appellant's argument be correct, all that is necessary to secure full constitutional protection is to do what was done here—namely, to give the charac-

ters a pseudo-Biblical background and to enact the seduction to the accompaniment of a reading from St. Matthew's Gospel. The matter then becomes, on appellant's contention, a case of religious freedom with which no one can interfere.

We submit, on the contrary, that the constitutional guarantee of freedom of religion is designed at least as much to protect the overwhelming mass of sincere religious believers of all denominations as it is to protect the "rights" of a producer who wishes to make a profit from a commercial exhibition which obscenely parodies their most cherished beliefs. In forbidding the exhibition for profit of sacrilegious films, the Legislature was merely expressing in concrete form its constitutional right and duty to preserve public decency and to protect the interests of all the people of this State.

When confronted with a similar claim that the constitutional freedom of religion protected a speaker against prosecution for having delivered an indecent attack upon the very same religious beliefs which are parodied in "The Miracle", the Supreme Court of Maine said in *State v. Mockus*, 120 Me. 84, 94, 113 Atl. 39, 43, 14 A. L. R. 871, 876 (1921):

"Even as we are writing these words the man who is about to assume the duties of the high and responsible station of President of these United States, following the unbroken custom of more than a century, and to the end that his official vow may be more impressive and binding, reverently says, 'So help me God,' and then pausing, with equal reverence, salutes the Holy Scripture by a kiss. Congress and state Legislatures open their sessions with prayer addressed to the God of the Christian religion. Judicial tribunals, anxious to discover and apply the truth, the whole truth, and

nothing but the truth require those who are to give testimony in courts of justice to be sworn by an oath which recognizes Deity. Thus it will be seen that there is acknowledgment of God in each co-ordinate branch of government. Lest any argument in support of the recognition of God in the fundamental law of our state should be overlooked we point to the very preamble of our Constitution.

'We, the people of Maine, in order to establish justice, insure tranquility, provide for our mutual defense, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity so favorable to the design; and imploring His aid and direction in its accomplishment do ordain and establish the following Constitution.'"

And in the case at bar the Court of Appeals said (303 N. Y. at p. 259):

"To say that government may not intervene to protect religious beliefs from purely private or commercial attacks or persecution, whatever the underlying motive, and however skillfully accomplished, as distinguished from the assertion of conflicting beliefs, is to deny not only its power to keep the peace, but also the very right to 'the free exercise' of religion, guaranteed by the First Amendment. The offering of public gratuitous insult to recognized religious beliefs by means of commercial motion pictures is not only offensive to decency and morals, but constitutes in itself an infringement of the freedom of others to wor-

ship and believe as they choose. Insult, mockery, contempt and ridicule can be a deadly form of persecution—often far more so than more direct forms of action. The prohibition of such conduct comes within the legitimate sphere of State action, and this State has recognized this principle, not only in the Education Law but in other respects as well (see, e.g., Penal Law, art. 186; Civil Rights Law, art. 4). We are not aware that this power has ever been even impliedly denied to the States.

"This nation is a land of religious freedom; it would be strange indeed if our Constitution, intended to protect that freedom, were construed as an instrument to uphold those who publicly and sacrilegiously ridicule and lampoon the most sacred beliefs of any religious denomination to provide amusement and for commercial gain."

*Cantwell v. Connecticut*, 310 U. S. 296 (1940), cited by appellant, is no authority for the proposition that the exhibition for profit of an indecent and sacrilegious film is peculiarly protected by the Constitution of the United States. In that case the defendant Gantwell, in the course of what he conceived to be his religious duties as a Jehovah's Witnesses, solicited religious contributions without obtaining the permit required by state statute and played a phonograph record which attacked the religious beliefs of others. On the charge of soliciting funds for religious purposes without a permit, this Court properly held that the statute was unconstitutional. On the charge that the playing of the phonograph record constituted a common-law breach of the peace, this Court held that no such breach was shown.

This Court itself thus explained the *Cantwell* decision in *Cox v. New Hampshire*, 312 U. S. 569, 578 (1941):

"In *Cantwell v. Connecticut, supra* (p. 305) the statute dealt with the solicitation of funds for religious causes and authorized an official to determine whether the cause was a religious one and to refuse a permit if he determined it was not, thus establishing a censorship of religion."

There has been no such censorship here. No one has been compelled by the action of the Regents or of the New York courts to believe or to disbelieve in anything. No one has been debarred by their action from expressing his beliefs or disbeliefs. The only thing they have done has been to apply the plain mandate of the statute to prevent the showing for profit in a public theatre of a film whose basic theme is an indecent parody of the religious convictions of millions of citizens of different faiths.

Such was the position taken by the Appellate Division when it said:

"A view of the picture in question would convince any reasonable mind that it was conceived and produced purely as an entertainment spectacle, and not as a vehicle for inquiry or discussion as to the merits of any religious dogma. The statute does not muzzle either free speech or a free press. All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom. It should be added in connection with this point that news films, scientific and educational films, are expressly exempt from censorship (Education Law, Section 123)."

The Court of Appeals has sustained this construction of the whole statute. Judge Froessel stated plainly:

"Religious presentations, as ordinarily understood, as well as other educational and scientific films, are exempt (Education Law, § 123). Thus freedom of religion is not impaired in the slightest, as anyone may express any religious or antireligious sentiment he chooses through a proper use of the films" (303 N. Y. at p. 258).

\* \* \* \* \*

"There is here no regulation of religion, nor restriction thereof or other interference with religious beliefs except insofar as the picture itself does so, nor is there any establishment of religion or preference of religion or use of State property or funds in aid of religion. There is nothing more than a denial of the claimed right to hurl insults at the deepest and sincerest religious beliefs of others through the medium of a commercial entertainment spectacle" (303 N. Y. at p. 259).

Unlike the situation in *Kunz v. New York*, 340 U. S. 290, we have here a statute establishing "fair standards in safeguarding peace" in the State. The words of Mr. Justice Frankfurter relating to that case are thus particularly pertinent here:

"In the present case, Kunz was not arrested for what he said on the night of arrest, nor because at that time he was disturbing the peace or interfering with traffic. He was arrested because he spoke without a license, and the license was refused because the police commissioner thought it likely on the basis of past performance that Kunz would outrage the religious sensibilities of others. If such had been the supportable finding on the basis of fair standards in safeguarding peace in one of the most populous cen-

ters of New York City, this Court would not be justified in upsetting it. It would not be censorship in advance. But here the standards are defined neither by language nor by settled construction to preclude discriminatory or arbitrary action by officials. The ordinance, as judicially construed, provides that anyone who, in the judgment of the licensing officials, would 'ridicule' or 'denounce' religion creates such a danger of public disturbance that he cannot speak in any park or street in the City of New York. Such a standard, considering the informal procedure under which it is applied, too readily permits censorship of religion by the licensing authorities. *Cantwell v. Connecticut*, 310 U. S. 296. The situation here disclosed is not, to reiterate, beyond control on the basis of regulation appropriately directed to the evil" (*Niemotko v. Maryland*, 340 U. S. 268 at pp. 285-6).

In the instant case the standard, as the courts below have held, is readily understandable and sufficiently definite. Its application involves none of the elements of speculation, since it is to be applied on the basis of examination of the fixed medium to which it applies,—i.e. the motion picture film and accompanying sound track actually proposed to be exhibited. Nor is the procedure characterized by the informality present in the *Kunz* case, since the hearing is before an established body operating under a fixed statute, which provides full opportunity for both administrative and judicial review (cf. N. Y. Education Law, §124). The statute properly and correctly relates to preservation of the public peace, and in no way abridges the free exercise of religion or the expression of religious belief or disbelief.

## POINT IV

**In any event appellant is estopped to attack the constitutionality of the statute.**

In *Fahey v. Mallonee*, 332 U. S. 245, 255 (1947), this Court said:

"It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.' *United States v. San Francisco*, 310 U. S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 348, 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.'

That principle is directly applicable here. Appellant originally submitted without question to the licensing requirements of the statute and applied for, and obtained, a license from the Motion Picture Division. Not only that, but appellant now insists—as it did in its previous action for injunction before Mr. Justice Steuer (*Burstyn v. McCaffrey, supra*) that that license was lawfully issued and that appellant is entitled to protection under it, no matter what the Regents or anyone else might do. In its brief in the Appellate Division (pp. 48-9) appellant insisted that the Court should now "order the restoration to the petitioner of said license".

The restoration of the license which petitioner seeks in the judicial proceeding now under review would automatically give appellant the right to exhibit this film in perpetuity in the State of New York, and would automatically exempt appellant from any criminal proceedings, since the

New York Legislature has provided (L. 1950, Ch. 624) that there can be no criminal prosecution for the exhibition of a licensed motion picture.

All other considerations apart, appellant has plainly estopped itself from asserting that the licensing statute, the protection of which it seeks, is unconstitutional and that there is no lawful authority anywhere in the State of New York or in the United States which can require a license for this picture. Appellant cannot attack the constitutionality of a statute the benefits of which it originally sought, and indeed still seeks, to obtain. This indeed was the view of the Court of Appeals, which said (303 N. Y. at p. 269):

*"Petitioner finally argues that the statute is unconstitutional *in toto*; that motion pictures are to be treated as the press generally, and may not be subjected to censorship or prior restraint. While it may not be heard in this respect, inasmuch as it has sought and obtained benefits under the statute, and even now seeks to retain the licenses granted (*Fahey v. Mallonee*, 332 U. S. 245, 255; *Shepherd & Mount Vernon Trust Co.*, 269 N. Y. 234, 244-247), we shall dispose of this argument upon the merits."* (Italics ours.)

**CONCLUSION**

**The order appeal from should be affirmed.**

Dated: April 15, 1952.

Respectfully submitted,

CHARLES J. TOBIN

*Attorney for the New York State  
Catholic Welfare Committee  
100 State Street  
Albany, N. Y.*

EDMOND B. BUTLER

PORTER R. CHANDLER

PATRICK C. DUGAN

GEORGE A. TIMONE

FREDÉRICK G. WATSON

*Of Counsel*

LIBRARY  
SUPREME COURT, U.S.

Office - Supreme Court, U. S.

APR 23 1952

CHARLES ELMORE CROPLEY  
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951

No. 522

JOSEPH BURSTYN, INC.,  
*Appellant,*  
*against*

LEWIS A. WILSON, Commissioner of Education of the State  
of New York, et al.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION  
AND AMERICAN JEWISH CONGRESS, AS  
*AMICI CURIAE*

AMERICAN CIVIL LIBERTIES UNION,  
*Amicus Curiae,*  
MORRIS L. ERNST,  
H. WILLIAM FITELSON,  
OSMOND K. FRAENKEL,  
ARTHUR GARFIELD HAYS,  
HERBERT MONTE LEVY,  
EMANUEL REDFIELD,  
*Counsel.*

NEWELL G. ALFORD, JR.,  
ROBERT MARKEWICH,  
ELMER RICE,  
of the New York Bar,

EBERHARD P. DEUTSCH,  
of the Louisiana Bar,

WILLIAM V. GEORGE,  
AUSTIN T. WALDEN,  
of the Georgia Bar,

*of Counsel.*

AMERICAN JEWISH CONGRESS,  
*Amicus Curiae,*  
HERMAN L. WEISMAN,  
SHAB POLIER,  
WILL MASLOW,  
LEO PFEFFER,  
PHILIP BAUM,  
*Counsel.*

METROPOLITAN COMMITTEE FOR RELIGIOUS LIBERTY,  
HERMAN SEID,  
*Of Counsel.*

INTERNATIONAL MOTION PICTURE ORGANIZATION,  
A. JOSEPH HANDEL,  
of the New York Bar,  
*of Counsel.*

# INDEX

	PAGE
STATEMENT OF FACTS .....	1
INTEREST OF AMICI .....	2
POINT I.—To serve the ends of freedom of speech, motion pictures must receive its protection. The case of <i>Mutual Film Corp. v. Ohio Industrial Com-</i> <i>mmission</i> , 236 U. S. 230 (1915), cannot now prevent the vindication of the principles of the free press..	
A. Only after the <i>Mutual Film</i> case was it held that the First Amendment, via the Fourteenth, protects speech from state action .....	4
B. Even if movies were mere entertainment, they would still be protected by the First Amend- ment. But they are not now mere entertainment.....	5
(1) No Constitutional Line Can Be Drawn Be- tween Entertainment and Other Expression; Mere Entertainment Must Receive Constitu- tional Protection .....	6
(2) In Any Event, Films Not Now Mere Enter- tainment .....	12
(3) General Recognition That Motion Pictures Not Mere Entertainment .....	15
C. The New York State Censorship Law estab- lishes a previous administrative restraint, the form of restraint which inevitably and most completely violates the freedom of the press .....	20
POINT II.—The law permitting revocation or denial of a license because of a finding that a film is “sacrilegious” constitutes a law respecting an establishment of religion and a prohibition of free exercise thereof in violation of the First and Four- teenth Amendments to the United States Constitu- tion .....	
	25

	PAGE
A. The Constitutional Issue .....	25
B. Sacrilege and Heresy .....	26
(1) Definition of "Sacrilege" by Court of Appeals .....	26
(2) The decision below in fact involves suppression of heresy.....	28
(3) Once begun, state suppression of heretical views requires a boundless inquisition into religious views .....	30
(4) Heresy and Religious Liberty .....	35
C. Sacrilege and Blasphemy .....	43
(1) Suppression of blasphemy as an aid to established religion .....	44
(2) Prohibitions against blasphemy in the United States are consonant with First and Fourteenth Amendments .....	49
(3) Blasphemy laws require active intervention by the state in religious affairs .....	54
POINT III—Section 122 of the Education Law cannot be justified as a proper exercise of the State Police Power .....	55
POINT IV—Section 122 of the Education Law is vague, indefinite and ambiguous. It is void for failing to conform to the requirement of due process of law as prescribed by the Fourteenth Amendment .....	60
CONCLUSION .....	64
APPENDIX I—The Academy Awards .....	67
APPENDIX II—Motion Pictures Playing in the Borough of Manhattan, New York City, the week of Feb. 23, 1952, as Reported in CUE (Feb. 23, 1952 issue) .....	70

A. Motion pictures with social, historical or informational significance .....	70
B. The other pictures listed in the said issue of CUE, and not classified in the category above, are listed below .....	73

### Table of Cases Cited

<i>American Communications Association v. Douds</i> , 339 U. S. 382, fn. 18 (1950) .....	23
<i>Atwood's Case</i> , Cro. Jac. 421 (ed. of 1638) .....	46
<i>Beauharnais v. Illinois</i> , No. 118, U. S. Sup. Ct. (Oct. Term, 1951) .....	30
<i>Bodenhamer v. State</i> , 60 Ark. 10, 28 S. W. 507 .....	62
<i>Bridges v. California</i> , 314 U. S. 252, 267-268 (1941) .....	4
<i>Bury v. Chappell</i> , Gould 135 .....	44
<i>Cantwell v. Connecticut</i> , 310 U. S. 296, 306 (1940) .....	21, 25, 40, 41
<i>Caudrey's Case</i> (1590), 5 Coke at 8b, 9a .....	45
<i>Commonwealth v. Brown</i> , 67 Pa. Dist. & Co. 151 (1948) .....	62
<i>Commonwealth v. Kneeland</i> , 37 Mass. 206, 213 (1836) .....	44, 49
<i>Commonwealth v. Linn</i> , 158 Pa. 22 (1893) .....	62
<i>Connally v. General Construction Company</i> , 269 U. S. 385, 391 .....	60
<i>Cowan v. Milbourn</i> (1867), L. R. 2 Exch. (Eng.) 230 .....	47
<i>Davis v. Beason</i> , 133 U. S. 133 .....	51
<i>Davis v. Gardiner</i> , 4 Coke 16b (1593) .....	44
<i>Davis v. Massachusetts</i> , 167 U. S. 43 (1897) .....	4
<i>Dennis v. United States</i> , 340 U. S. 887 (1950) .....	59
<i>Douglas v. City of Jeannette</i> , 319 U. S. 157 (1943) .....	39
<i>Duncan v. U. S.</i> , 48 Fed. 128 (CCA Ore.) (1933), cert. denied, 283 U. S. 863 .....	62
<i>Everson v. Board of Education of Township of Ewing</i> , 330 U. S. 1 (1947) .....	25, 26, 48, 51, 53
<i>Gaines v. State</i> , 7 Lea (Tenn.) 410 (1881) .....	62
<i>Gatherecole's Case</i> (1838) (2 Lewin, C. C. (Eng.) 237) .....	48

## PAGE

<i>Gelling v. The State of Texas</i> , decided January 30, 1952, not yet officially reported .....	12
<i>Geree v. State</i> , 71 Ala. 7 (1881) .....	62
<i>Gitlow v. New York</i> , 268 U. S. 652 (1925) .....	4, 5
<i>Hague v. C. I. O.</i> , 307 U. S. 496, 516 .....	20
<i>Halwood v. Hopkins</i> , Cro. Eliz. 787 .....	44
<i>Hannegan v. Esquire</i> , 327 U. S. 146, 160 (1946) .....	8, 23
<i>Ireland v. Smith</i> , 1 Br. & Gold. 12 .....	44
<i>Jordan v. DeGeorge</i> , 341 U. S. 223 (1951) .....	60
<i>Kovacs v. Cooper</i> , 336 U. S. 77, 96 .....	12
<i>Kunz v. New York</i> , 340 U. S. 290 .....	40, 60, 63
<i>Lane's Case</i> (1631), Reports of Cases in the Courts of Star Chamber and High Commission (C. S. 1886), 188, 190, 193 .....	45
<i>Largent v. Texas</i> , 318 U. S. 418, 422 (1943) .....	21, 22-23
<i>Leach v. Carlile</i> , 258 U. S. 138, 141 (1922) .....	21
<i>Lynch v. City of Muskogee</i> , 47 F. Supp. 592 (D. C. Okla. 1942) .....	58
<i>McCollum v. Board of Education</i> , 333 U. S. 203 (1948) .....	25, 26, 30, 42, 51, 53
<i>Murdoch v. Pennsylvania</i> , 319 U. S. 105 .....	51
<i>Mutual Film Corp. v. Ohio Industrial Commission</i> , 236 U. S. 230 (1915) .....	4, 5, 12, 20, 22, 23, 24
<i>Near v. Minnesota</i> , 283 U. S. 697, 713 .....	10, 21
<i>Nicholson v. Lyne</i> , Cro. Eliz. 94 .....	44
<i>Oney v. Oklahoma City</i> , 120 F. (2d) 861 (C.C.A. 10th, 1941) .....	58
<i>Palmer v. Thorpe</i> , 4 Coke 20a .....	44
<i>People v. Croswell</i> , 3 Johns 337 .....	51

<i>People v. Ruggles</i> , N.Y. 8 Johns, 290, 292 (1811)	43, 49, 51, 52, 53
<i>Prince v. Mass.</i> , 321 U.S. 158	51
<i>Reg. v. Petcherini</i> (1856), 7 Cox, C.C. (Eng.) 79	47
<i>Regina v. Ramsay and Foote</i> , 15 Cox, C.C. (Eng.) 231 (1883)	47
<i>Republic v. Ben</i> , 10 Hawaii 278 (1896)	62
<i>Schneider v. State</i> , 308 U.S. 147, 162-165	20
<i>Specot's Case</i> , 5 Coke at 57b	44
<i>State v. Chandler</i> , 2 Harr. (Del.) 553 (1838)	49
<i>State v. Mockus</i> , 120 Me. 84, 91 (1921)	43
<i>State v. Pepper</i> , 68 N.C. 243, 12 Am. R. 637 (1872)	62
<i>State v. Shanks</i> , 88 Miss. 410	62
<i>Taylor's Case</i> , 3 Keb. 607	46
<i>Taylor v. U.S.</i> , 98 U.S. 145	55
<i>Terminiello v. City of Chicago</i> , 337 U.S. 1, 4-5 (1949)	58
<i>Thompson v. State</i> , 34 A1. App. 608	62
<i>Thornhill v. Alabama</i> , 310 U.S. 88, 102 (1940)	10, 20, 24
<i>Town of Torrington v. Taylor</i> , 137 P. 2d 621 (Wyo. 1943)	62
<i>United States v. Ballard</i> , 322 U.S. 78 (1943)	38, 51
<i>U.S. v. Capital Traction Company</i> , 34 App. D.C. 592	60
<i>U.S. v. Cohen Grocery Company</i> , 255 U.S. 81	60
<i>United States v. Paramount Pictures</i> , 334 U.S. 131, 166 (1948)	5, 22, 23
<i>Updegrah v. Commonwealth</i> , 11 S & R (Pa.) 394 (1824)	44, 49
<i>Watson v. Jones</i> , 80 U.S. 679, 728 (1869)	38
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	25, 38
<i>Winters v. New York</i> , 333 U.S. 507, 510 (1948)	8, 23, 63
<i>Young v. State</i> , 10 Lea (Tenn.) 165 (1882)	62

**Constitutional Provisions, Statutes and  
Regulations Cited**

**Constitution of the United States:**

	PAGE
First Amendment .....	4, 5, 25
Fourteenth Amendment .....	4, 25
7 and 8 George IV Ch. 29, See. 10 .....	27
New York Civil Practice Act, Article 78 .....	2
New York Constitution of 1777 .....	51
N. Y. Education Law, Sec. 122 .....	26, 28, 34, 37, 41, 43, 48, 53, 55, 60

**New York Penal Law:**

Section 720 .....	59
Section 722 .....	24, 59
Section 2074 .....	8, 9

Regulations of Board of Regents of the University of the State of New York, par. 244 .....	42
24 and 25 Victoria Ch. 95, Secs. 1, 19 .....	27
Virginia Bill Establishing a Provision for Teachers of the Christian Religion .....	54

**Texts, Articles and Periodicals Cited**

Abbott, Dictionary of Words and Phrases .....	27
An Analysis of Crucifixion Films .....	36
Annals of American Academy of Political and Social Science, November, 1926 .....	15
Bible, 1. Kings 18, 27 .....	41
Black's Dictionary of Law, 1933 .....	27
Blackstone's Commentaries, Vol. 4 .....	28, 44
Blau, Cornerstones of Religious Freedom in America .....	39, 54
Bouvier, Standard Law Dictionary .....	27
Catechism of Christian Doctrines, rev. ed. of the Baltimore Catechism, 1949, Lesson 27, p. 24 .....	9

## PAGE

Cobbett, Parliamentary History of England, Vol. XVI	44
Columbia Alumni News, February 1952	10
Commonweal	56
62 Congressional Record 5621, 9655, 9656, 9657	18
70 Congressional Record 3554	18
87 Congressional Record 423, 6565, 6903	19
93 Congressional Record 9000, 82687	19
Cue Magazine, February 23, 1952	14
Donnelly, Government and Freedom of the Press, 45 Illinois Law Review 31 (1950)	20
Feature Motion Pictures Reviewed by New York Office of Legion of Decency (1936-1950)	31
Funk & Wagnalls New Standard Dictionary of the English Language (1935)	44, 61
Gödolphin, Repertorium Canonicum (1687)	45
Grayzel, The Church and the Jews in the Thirteenth Century (1933)	37
Holdsworth, History of English Law, Vol. VIII	47
Holmes-Pollock Letters, Vol. I	14
Inglis, Freedom of the Movies	17, 18
Jacob, The Rise of the American Film	12, 15
Jefferson, Memoirs, Correspondence and Miscellanies, edited by Thomas Jefferson Randolph (1829), Vol. 4	29
Journal of the Continental Congress	8
Journal of the New York Constitutional Convention	52
Kupferman & O'Brien, Motion Picture Censorship, 36 Cornell Law Quarterly 273	4
Levy, The Case Against Film Censorship, Films In Review, Vol. 1, No. 3 (April, 1950)	2
Lyndwood, Provinciale (1679)	45

Motion Pictures and the First Amendment, 60 Yale Law Journal 696 .....	4
Motion Picture Production Code .....	16
National Council on Freedom from Censorship, What Shocked the Censors .....	2
New York Herald Tribune, February 20, 1952 .....	1
New York Herald Tribune, March 25, 1952 .....	23
New York Times, May 26, 1914 .....	12
New York Times, March 14, 1915 .....	12
New York Times, October 31, 1915 .....	12
New York Times, September 30, 1948 .....	33
New York Times, October 1, 1948 .....	33
New York Times, December 24, 1950 .....	43
New York Times, February 21, 1951 .....	32
New York Times, March 26, 1951 .....	9
New York Times, February 10, 1952 .....	11
New York Times, March 29, 1952 .....	2
Nokes, Crime of Blasphemy (1928), .....	44, 45, 46, 47
Odgers, A Digest of the Law of Libel and Slander (1911) .....	45
Redbook Magazine, July, 1951, What Censorship Keeps You From Knowing .....	2
Schroeder, Constitutional Free Speech Defined and Defended (1919) .....	48, 53
Social Action Magazine, January 15, 1946 .....	36
Stephen, History of Common Law, Vol. II .....	45
Swancara, Separation of Religion and Government (1950) .....	29
"Vigilanti Cura", Encyclical Letter of Pius XI, June 29, 1936 .....	3
Webster's New International Dictionary of the English Language, 2nd Ed. 1940 .....	27
Zeitlin, Who Crucified Jesus (1942) .....	35

Supreme Court of the United States  
OCTOBER TERM, 1951

---

No. 522

---

JOSEPH BURSTYN, INC.,  
*Appellant,*

*against*

LEWIS A. WILSON, Commissioner of Education of the State  
of New York, *et al.*

---

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION  
AND AMERICAN JEWISH CONGRESS, AS  
AMICI CURIAE**

**Statement of Facts**

The motion picture film "The Miracle" was twice granted a license for public exhibition in New York, first as a single feature, and again as a part of the trilogy entitled "Ways of Love," which won the New York Film Critics Award as the best foreign picture of 1950.\*

---

\* The New York Board of Regents has more recently banned the film "La Ronde," which won the British Film Academy Award for the best picture of 1951, and which has played in the District of Columbia and Los Angeles, without incident. New York Herald Tribune, Feb. 20, 1952, p. 17, col. 2. Even more recently, it banned as "indecent" a documentary film, "Latuko," sponsored by the American Museum of Natural History, which played previously in Hollywood, Los Angeles, Memphis, and Salt Lake City among others, apparently without any prosecutions for obscenity ever having been

The Board of Regents of the University of the State of New York, on February 16, 1951, almost two years after the first license was issued, rescinded and cancelled the licenses on the ground that the film was sacrilegious. This proceeding, an application for an order against respondents pursuant to Article 78 of the New York Civil Practice Act, and for an order enjoining respondents from cancellation of the licenses, resulted in the confirmation of the action of the Board by the Appellate Division of the New York Supreme Court, Third Department. This appeal is from the 5-2 affirmance of that decision by the New York Court of Appeals.

### • Interest of Amici

This brief *amici curiae* is submitted pursuant to consent of the parties. The American Civil Liberties Union, which has constantly striven for defense of the Bill of Rights of the United States Constitution, files this brief solely because it believes that civil liberties have been violated by the decision below. The American Jewish Congress is a national charitable, educational and religious association of American Jews which ~~was~~ organized “\* \* \* to help secure \* \* \* and to safeguard the civil, political, economic and religious rights of Jews everywhere” and “\* \* \* to help preserve, maintain and extend the democratic way of life.” We regard the principle of separation of church and state as one of the foundations of American democracy. Both political

---

brought against it. New York Times, March 29, 1952, p. 17, col. 8. For other examples of film censorship, see, in addition to the annual reports of the American Civil Liberties Union, *What Shocked the Censors*, published by the ACLU's National Council on Freedom from Censorship; *What Censorship Keeps You From Knowing*, Redbook Magazine, July 1951, pp. 24 ff.; Levy, *The Case Against Film Censorship*, Films In Review, Vol. I, No. 3, pp. 1 ff. (April 1950).

liberty and freedom of religious worship and belief, we are convinced, can remain inviolate only when there exists no intrusion of secular authority in religious affairs or of religious authority in secular affairs. We believe that the suppression of this film by State intervention threatens the integrity of secular institutions and endangers the private right of the creative artist as well as all other individuals to deal with matters of philosophic and artistic importance.

We take no position on the question of whether or not this film is sacrilegious or indeed deeply religious. Notable commentators, including many reputable clergymen as well as film art critics, have taken different views on this question (see Appellant's Brief, pp. 5-7). We are interested primarily in these two points: 1) That censorship of motion pictures prior to exhibition is in violation of the Fourteenth Amendment to the United States Constitution because it violates freedom of expression; and 2) that making the issuance or revocation of a license depend upon whether or not a film is found by a governmental body to be sacrilegious, is a violation of the Fourteenth Amendment to the United States Constitution because it is encroachment of the state in matters of religion and because the terms of reference are too vague.

## POINT I

To serve the ends of freedom of speech, motion pictures must receive its protection. The case of *Mutual Film Corp. v. Ohio Industrial Commission*, 236 U. S. 230 (1915), cannot now prevent the vindication of the principles of the free press.

It is our position that what authority the *Mutual Film* case may once have had has been so impaired by subsequent decisions of this Court that this Court should undertake its re-examination, lay the ghost of that precedent, and ~~vindicate~~ the fundamental constitutional principle that every vehicle of ideas is shielded from such censorship as was imposed in the instant case. Kupferman & O'Brien, *Motion Picture Censorship*, 36 Cornell Law Quart. 273; Note, *Motion Pictures and the First Amendment*, 60 Yale L. J. 696-719.

A. Only after the *Mutual Film* case was it held that the First Amendment, via the Fourteenth, protects speech from state action.

Only one free speech case had been decided by this Court (*Davis v. Massachusetts*, 167 U. S. 43 (1897)) before it decided the *Mutual Film* case. Ten years after its decision, a specific infirmity of that case became apparent when this Court, in its opinion in *Gitlow v. New York*, 268 U. S. 652 (1925) recognized for the first time "in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government." *Bridges v. California*, 314 U. S. 252, 267-268 (1941). Thus, though there may have been reasons, now no longer valid, for the Supreme Court decision in 1914 that motion pictures were not part of the "press," it is

also certain, as indeed the Court's opinion in the *Mutual Film* case explicitly shows, that a state's power to censor the "press" was there measured not against the First Amendment but only against that state's own constitutional provisions.

This Court itself, following the *Gillow* decision and the experience of the subsequent cases in which it was called upon to measure against the First Amendment many forms of censorship established by state and municipal authority, has deprived the *Mutual Film* case of its last vestige of substance by its dictum in *United States v. Paramount Pictures*, 334 U. S. 181, 166 (1948). There Mr. Justice Douglas, in an opinion concurred in by all but two of the members of the Court, said:

"We have no doubt that moving pictures, like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment."

This Court should, therefore, now explicitly overrule the *Mutual Film* case.

**B. Even if movies were mere entertainment, they would still be protected by the First Amendment. But they are not now mere entertainment.**

The *Mutual Film* case was brought and decided in the infancy of motion pictures when the potentialities of the medium as a means of communication and a form of art were necessarily as yet unrealized. That case represented a general attack *in vacuo* upon the first groping exercise of an assumed state power to regulate a novelty. Pictures were still silent then.

In the subsequent thirty-seven years, however, the law of the First Amendment has undergone constant refinement. The principle of the free press itself has received

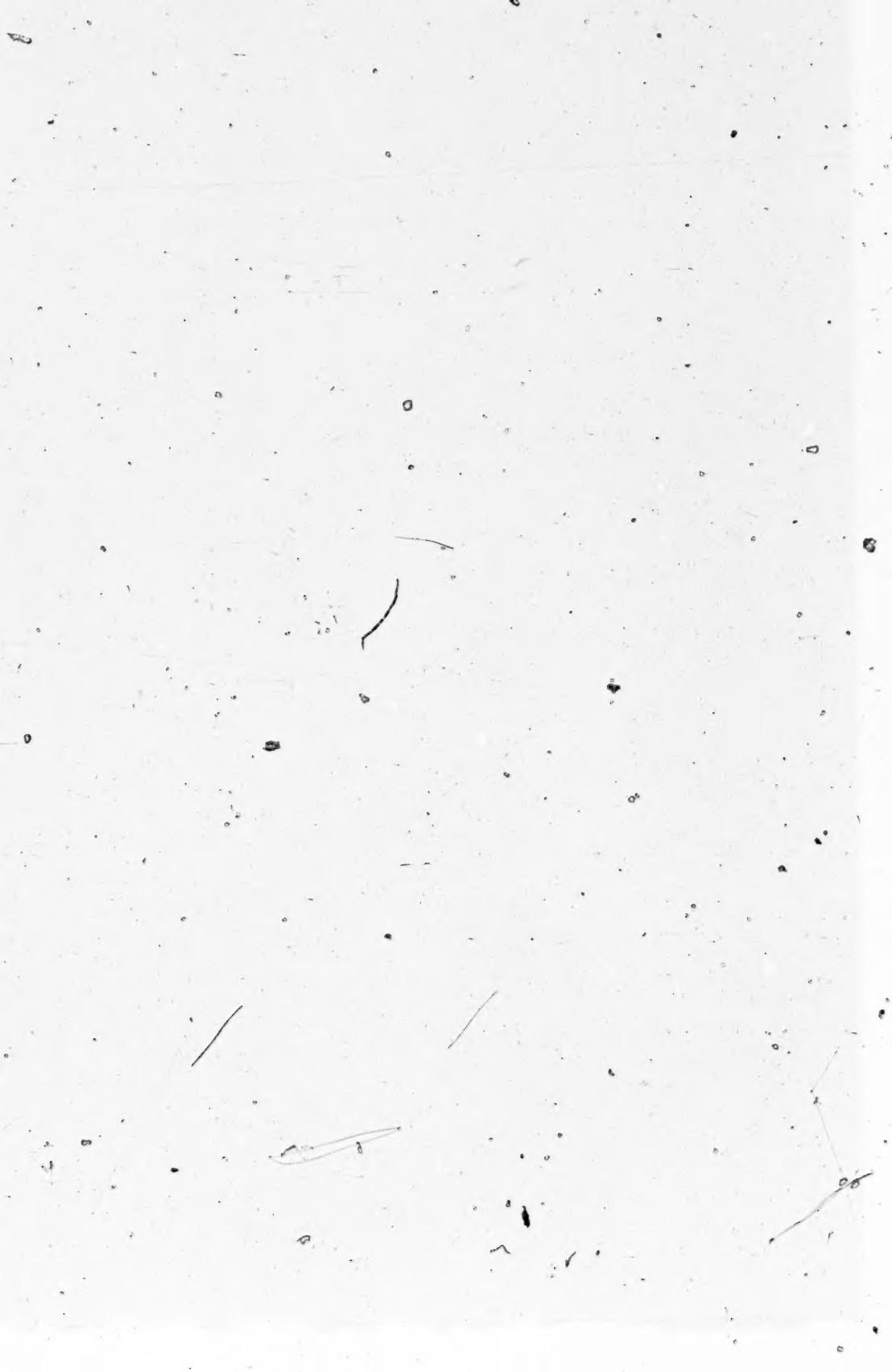
careful judicial scrutiny to the end that its purpose may be served more adequately.

Meanwhile, the potentialities of motion pictures for the dramatic presentation of ideas have been both realized and further developed. Today, at least 25% of motion pictures have ideational content (see *infra*, pp. 14-15). A decision rendered in a case brought (1913) before even one feature film or "talkie" had been exhibited in this country can hardly be considered binding in face of the nature and content of the modern film. The relation that the motion picture of 1913 bears to the present film is simply one of ancestry. The doctrine of "stare decisis" should hardly be applied to either modern films or modern man because of an earlier ruling on lineal forebears. The instant case, accordingly, presents a concrete example of the operation of censorship that could hardly have been presented to this Court in 1915.

When in that year this Court sustained state censorship laws, it said that motion pictures, being mere "spectacles," were not part of the "press." Clearly, this is no longer true.

**(1) No Constitutional Line Can Be Drawn Between Entertainment and Other Expression; Mere Entertainment Must Receive Constitutional Protection**

As seen by the table on the opposite page (the only one of its nature we could find) novels are one of the chief sources for motion picture stories. The present practice of printing motion picture scripts in book form for public consumption casts an interesting sidelight since both forms (original script and published script) are constitutionally exempt from censorship. Many magazines, such as the *Saturday Evening Post*, contain a vastly greater proportion of "pure" entertainment to ideational content than do movies taken as a whole; yet surely the fact that



SOURCE MATERIAL OF FEATURES 1934-1941

		1934	1935	1936	1937	1938	1939	1940	1941
Original Screen Stories	Number	244	371	391	316	329	323	358	
	Percent	40%	47%	67.82%	64.3%	58%	56.3%	61.8%	63%
Stage Plays	Number	41	38	39	30	34	51	57	
	Percent	12.5%	8%	6.96%	6.4%	5.5%	5.8%	9.8%	10%
Novels	Number	142	92	102	140	127	109	58	
	Percent	24%	26.4%	16.8%	16.8%	25.7%	21.7%	20.8%	10.2%
Biographies	Number	3	2	12	2	17	8	4	
	Percent	2.5%	.6%	.37%	2%	.3%	2.8%	1.5%	.7%
Short Stories	Number	37	39	46	54	59	21	82	
	Percent	11%	7%	7.13%	7.6%	10%	10.6%	4%	14.5%
Source Unknown	Number	28		11		10		5	
	Percent	6.4%		1.8%		1.6%		.9%	
Miscellaneous	Number	24	5	7	3	8	11	4	
	Percent	10%	4.6%	.91%	1.1%	.5%	1.2%	2.1%	.7%
Totals	Number	519	547	608	545	584	523	568	
	Percent	100%	100%	100%	100%	100%	100%	100%	100%

(Footnotes omitted.)

(From *Film Facts*, p. 54, published by the Motion Picture Producers & Distributors of America.)

the *Post* contains mainly mere entertainment does not exclude it from the protection of the First Amendment, nor does the fact that it is produced to make money. Surely the fact that movies are exhibited in theatres can make no difference (see *infra*, pp. 23-24). Moreover, since an integral part of the right to free speech is the right to see and hear, and since the motion picture today represents one of the most accessible sources for information for persons located everywhere in this country, it would be most anomalous to hold that this most vital means of communication was alone subject to censorship.

It is now established that in preserving what Mr. Justice Frankfurter, concurring in *Hannegan v. Esquire*, 327 U. S. 146, 160 (1946) termed "the very basis of a free society" \* \* \* the right of expression beyond the conventions of the day," there can be no line drawn between the instructive and the aesthetic. To the contention that the freedom of the press applies only to the exposition of ideas, this Court replied in *Winters v. New York*, 333 U. S. 507, 510 (1948):

"The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

The opinion of the Appellate Division below demonstrates the accuracy of this doctrine. After admitting that "in a sense" the statute "impinges on freedom of expression so far as religion is concerned,"\* the Appel-

---

\* These phrases were used below in relation to another statute (Penal Law, Section 2074) which the court stated "also" impinged such freedom. The Appellate Division reasoned that Section 2074 was constitutional, though it prohibits exhibitions in which there shall be a living character representing the deity of any known religion,

late Division held that the film was "produced purely as an entertainment spectacle" (R. 91); and went on to hold that it did discuss the merits of certain religious dogma. To paraphrase this Court, "What is amusement to the Appellate Division, is also doctrine to the Appellate Division." Though the film was entertainment, obviously, it would not have been censored had it not taught "objectionable" doctrine. The public is shielded from such doctrine because the doctrine is thus mere entertainment. The opinions below finally infer the dead doctrine that movies are solely entertainment. Motion pictures are no more pure entertainment sans ideas than are novels, and no one doubts that novels are entitled to the protection of the First Amendment.

Even if motion pictures were mere entertainment, it would be vitally important to stop censorship to prevent their continuance as mere entertainment, and to permit them to flourish as an important art form along with books and plays. Without censorship to stop development of

---

because no one ever challenged it. But the reason no one has challenged it is that no one has ever enforced it. Thus, Pulitzer Prize-winning play "The Green Pastures" in which the chief role is that of "De Lawd," ran—in a revival—on Broadway only last year, in spite of protests that it was sacrilegious (N. Y. Times 3/26/51, p. 24, col. 2), with no state action taken to prevent it. And the film "The Next Voice You Hear—" ran in New York last year, without any legal difficulties, though it too personified the Deity. Nor do we know of any film previously banned—in New York or anywhere else in this country—because of sacrilege. "The Miracle" seems to have been singled out.

Section 2074 prohibits the production of Passion Plays, Nativity Plays or other Christological portrayals, many of which are performed regularly throughout the community without incident and have become an integral part of Christian sectarian devotional exercises. These plays present Jesus Christ as a character although he is the Deity according to Catholic dogma. (*A Catechism of Christian Doctrines*, rev. ed. of the Baltimore Catechism (1949), Lesson 27 at p. 24: "Is the Son, God?" Answer: "The Son is God and the second Person of the Blessed Trinity.")

the theatre, even musical plays, as Richard Rodgers has stated:

\*\*\* are beginning to have something to say.  
They've gotten into long pants. So people are  
going to see them. \*\*\*

(As quoted in February, 1952 edition of *Columbia Alumni News*, at p. 26, col. 3.)

One of the principal ends of the First Amendment is to create an atmosphere in which the arts may flourish. To that end the censor's timid, pruning hand is banished. So, in the historic letter from the Continental Congress to the Inhabitants of Quebec, it was stated that the importance of freedom of the press consists "in its diffusion of liberal sentiments on the administration of Government" in addition to "the advancement of truth, science, morality, and *arts in general*".\*

As Bosley Crowther, the noted film critic of the New York Times, and perhaps the leading authority on the current screen, has stated in regard to this very case:

"The petitioner, Joseph Burstyn, who has carried the case to the highest court; his lawyer and many others who have the freedom of the screen at heart are hopeful that a full and final showdown on film censorship will be achieved—that the old stigma on movies as cheap entertainment will be legally removed. And well they may hope for liberation, for the whole future of the American screen would seem to depend upon its freedom to

---

\* Journal of the Continental Congress, 1904 ed., vol. I, p. 108. Italics added. This letter has been considered sufficiently significant in determination of the extent of protection afforded by the First and Fourteenth Amendment to be quoted at least twice by this Court. *Near v. Minnesota*, 283 U. S. 697, 717 (1931); *Thornhill v. Alabama*, 310 U. S. 88, 102 (1940).

grow up and handle subjects that have heretofore been taboo.

"Such freedom would not encourage license, any more than the freedom of the press encourages publishers and broadcasters to abuse their prerogatives. On the other hand, it would stimulate artists in the motion-picture realm to reach out for dramatic material of vitality and pertinence to life and shape it to meaningful screenplays uninhibited by the restrictions of censorship laws.

"Certainly the growing competition for the popular audience presented by TV—which, incidentally, is not subject to the laws of censorship—makes it imperative that movies continue to improve in quality so that they may draw the discriminating patrons who are interested in genuine adult themes. Unless the screen is free to cultivate this audience, with taste and intelligence, it will be doomed. A great and potential art medium will be forced to theatrical decay—at least, in this great and vital country where it has found its most stimulating soil.

"That is why everyone who is truly interested in the screen should await with bated breath the decision of the Supreme Court in the 'Miracle Case.'"

(New York Times, Feb. 10, 1952, first page of Section 2.)

Therefore, even though decision on this issue may be unnecessary to the disposition of this case, we urge that the Court pass upon the issue of the constitutionality of pre-censorship of motion pictures, lest, as a leading expert in the field predicts, the screen be doomed.

**(2) In Any Event, Films Not Now Mere Entertainment**

While at the time of the *Mutual Film* decision, films were mainly geared for entertainment, and might possibly have been constitutionally regulated by censorship (cf. Mr. Justice Frankfurter in *Kovacs v. Cooper*, 336 U. S. 77, 96, as quoted below, R. 157),\* a look at the modern Billboard discloses a completely different situation. In place of the nickelodeon and flickers are motion pictures dealing with important social and economic issues. Film producers have brought into the open the problems of the returning veteran (*Best Years of Our Lives*, *The Men*, *Bright Victory*), and the problems of anti-Negro and anti-Semitic prejudice (*Lost Boundaries*, *Gentlemen's Agreement*, *Home of the Brave*, *No Way Out*, *Pinky*\*\*). All combined

\* Whether motion pictures were mere entertainment even in 1913, when the *Mutual Film* case was begun, is open to question. On May 26, 1914, the New York Times had commented editorially that movies "are broadening the public knowledge," that "some of the current picture shows are really marvels of selection, patience and skill and they will always survive as illustrations of travel, as aids to the understanding of natural history." N. Y. Times, 5/26/14, p. 10, col. 3. See also Jacob, *The Rise of the American Film*, p. 77: "Movies were by this time (1908) acknowledged not as just an innocent novelty but as a powerful medium of social expression \* \* \* one of the chief sources for new ideas, points of view, attitudes toward government and society, habits of mind, standards of taste, conduct, morals, canons of convention, culture. \* \* \* How powerful a social agency the motion picture could be was still, however, to be realized." And it was only seven days after this Court's decision in the *Mutual Film* case was handed down that the N. Y. Times ran a review of the controversial film on the social, economic and political aspects of the Civil War, *Birth of a Nation*. N. Y. Times, 3/14/15, Sect. 7, p. 10, col. 1-4; Jacob, op. cit. *supra*, pp. 171-222. Again in 1915, the N. Y. Times (10/31/15, Main Section, p. 16, col. 5) commented editorially that "the educational side of the (motion) pictures is not to be ignored \* \* \*." And as early as 1920, the movies consciously engaged in anti-communist propaganda at the suggestion of the U. S. Secretary of the Interior. Jacob, p. 398.

\*\* The Texas Court of Criminal Appeals recently affirmed a local ban on *Pinky*. (*Gelling v. The State of Texas*, decided January 30, 1952, not yet officially reported.) An appeal was docketed in this Court on April 15, 1952.

some degree of entertainment with some degree of serious treatment of social issues. Most critics felt that the value of these pictures as effective social comment increased in direct proportion to their quality as entertainment. It would be strange indeed if treatment of social issues could be banned the moment it began to possess entertainment value as well.

A glance at the list of Academy Awards to motion pictures, their stars and directors, over the last fifteen years (see Appendix I, *infra*, pp. 67-69) demonstrates the increasing importance of social and historic content in important films. As early as 1930, the movie industry produced the great anti-war picture, *All Quiet on the Western Front*, in the same year that it produced the story of *Disraeli*. In 1933, the two historical dramas, *Cavalcade* and *Henry VIII* took awards. A story of the psychological problems of *The Informer* took awards in 1935, and the acid social satire of *Mr. Deeds Goes to Town* received the honors the next year. The inspiring *Life of Emile Zola* and Pearl Buck's commentary on modern China, *The Good Earth*, took awards in 1937. *Boys' Town*, a story of a priest's reformation of juvenile delinquents, won an award for its male star in 1938. *Gone With the Wind*, a fictionalized treatment of the Civil War, won three awards in 1939. *The Grapes of Wrath*, John Steinbeck's story of America's D.P.'s, the "Okies," won an award for its director in 1940. *How Green Was My Valley*, a story of coal miners' problems, and *Sergeant York*, a story of that hero's physical bravery and spiritual conflict in World War I, both took awards in 1941. In 1942, *Mrs. Miniver* (British heroism under bombing of World War II), and the patriotic musical, *Yankee Doodle Dandy*, took awards; the deeply religious *Song of Bernadette* and the anti-Nazi *Watch on the Rhine* were winners in 1943. The touching story of two Catholic priests in *Going My Way* won the

Academy Award in 1944. A psychological study of the alcoholic, *The Lost Week-End*, won in 1945. *The Best Years of Our Lives*, a study of the problems facing returning veterans, won in 1946. *Gentlemen's Agreement*, an attack on anti-Semitism, won in 1947. *All the King's Men*, a slightly-disguised version of the rise of "dictator" Huey Long in Louisiana, won in 1949. In 1950, *Born Yesterday*, a comic treatment of the corruption in Washington, won an award for its leading actress.

Further proof that motion pictures are not mere entertainment, and that a line cannot be drawn between information and entertainment,\* can be found through a study of current motion pictures. We have examined the issue of *Cue* magazine on the newsstands the day this section is being put in its first draft. The February 23, 1952 Manhattan issue of that New York magazine carries, as do all its issues, "Brief Movie Reviews" of movies playing that week in the Borough of Manhattan in the City of New York, a good cross-section of those produced annually throughout the country. An analysis of the 166 movies reviewed (pp. M-21 to M-23) indicates that at least 42, or more than 25% thereof, have some social, historical, or informational significance. We have collated these 42 pictures, together with appropriate quotations from *Cue's* or other reviews, in part A of Appendix II to this brief (pp. 70-73). The other 125 pictures are also listed by name in part B. We have listed in part A

---

\* Mr. Justice Holmes delighted in his experience of an instance of a mixture of information and entertainment, particularly relevant to this case. In a letter of August 9, 1897, he had this to say: (1 Holmes—Pollock Letters, 76-77) "Brooks Adams \* \* \* can tell you history with inimitable vividness not unmixed with enhancing profanity. Thanks to him I have had more fun out of the crusades than any of the actors in them ever did, and he is really fine when he gets going on the Church of England. Also his presentation of the Catholic priesthood as medicine men is tickling to the malevolent fancy."

only those pictures which *clearly* have such significance; doubtless it could be well argued that many pictures listed in part B had such significance as well.

### (3) ***General Recognition That Motion Pictures Not Mere Entertainment***

The importance of film as a medium of expression was recognized by the American Academy of Political and Social Science as early as November, 1926, when it devoted an entire issue of its Annals to "The Motion Picture in its Economic and Social Aspects." There is something in almost each picture that is more than mere entertainment. See on this, Jacob, *The Rise of the American Film* (1939), in which he analyzes every movie produced to that date for its social content; see also the bibliography in Jacob, *ibid.* at 541-564. Jacob's closing remarks (pp. 538-539), are well worth quotation.

"Nearly a half-century of American life could not slip by without affecting the motion pictures; nearly a half-century of motion pictures could not pass before the public gaze without affecting American life. Under the guise of entertainment movies have always not only reflected but instilled ideas and attitudes. Their power and subtlety of expression have intensified, their scope has broadened, and a widening audience has made their influence ever more potent. While being the 'mirror of history,' as Will Hays has said, this young art—in 1896 'another toy for Thomas Edison—has shaped the thought and course of twentieth century America.'

"Within the span of our own lifetime the American movie has come up from a minor nickel novelty to one of the foremost industries of the world whose investments total billions of dollars yearly and

whose markets extend throughout the world. Beginning as a mechanical form of amusement, without any pretensions to art, the movie has enlisted all of the older arts, has developed artists within its own realm, and has discovered its own distinguishing characteristics and standards as a unique medium of expression. At the same time the moving picture has grown from a limited and comparatively simple recording device to a subtle and complex social instrument so vast in range and powerful in effect that it has become one of the most influential agencies of modern times.

"This phenomenal rise has been brought about by the interaction of business man, artist, and scientist. Each has contributed with varying degrees of potency to the movie's development in every stage. After almost half a century of progress, the American film has achieved a degree of maturity. It now moves forward toward a more profound destiny. Its future lies in the creation of new forms of expression, in the deepening of its content, and in the elevation of its integrity and its point of view."

It would seem hardly necessary to point out that the importance of the screen as a means of expression is well-recognized today, but we nonetheless document this contention further.\* Eric Johnston, former President of the

---

\* It is noteworthy that private censors themselves have acknowledged the true nature of the film. Motion Picture Production Code: "2—Correct standards of life shall, as far as possible, be presented.

*"A wide knowledge of life and living is made possible through the film. When right standards are consistently presented, the motion picture exercises the most powerful influences. It builds character, develops right ideals, inculcates correct principles, and all this in attractive story form.*

*"If motion pictures consistently hold up for admiration high types of characters and present stories that will affect lines for the better, they can become the most powerful natural force for the improvement of mankind."* (Italics supplied.)

Motion Picture Association, wrote Mrs. Franklin D. Roosevelt on May 7, 1946 that "the motion picture is one of the most potent instruments ever devised for the dissemination of ideas, information and mutual understanding between peoples. The motion picture no longer is looked upon solely as a device for mere entertainment." (As quoted in Inglis, *Freedom of the Movies*, p. 5.) Important, too, are the three quotations below from leaders in the industry:

*Murray Silverstone*, Pres., 20th Cent. Fox: "Our industry is today more aware than ever before that movies are one of the most powerful forms of expression and persuasion. There is, therefore, complete agreement that the motion picture must continue as an articulate force in the postwar world so that it can contribute vitally and validly to the development of permanent peace, prosperity, progress and security on a global basis. It means that the motion picture has definitely broadened its scope of activity to include many more themes which can be presented in dramatic and entertaining manner." (*Variety*, Jan. 9, 1946, as quoted *id.* at 11-12.)

*Samuel Goldwyn*: The two jobs of the screen are "to entertain and to educate. \* \* \* pictures \* \* \* teach when they are pretending not to." (*N. Y. Times Magazine*, April 22, 1945, as quoted *id.* at 12.)

*Barney Balaban*, President of Paramount Pictures: "The screen can hope to do something more than to provide purely escapist entertainment." (*N. Y. Times*, March 24, 1946, as quoted *ibid.*)

*Jack L. Warner*, of Warner Brothers: "Honest exchange of information and ideas is the primary function of motion pictures as well as of newspapers and the radio." (*N. Y. Times*, Dec. 18, 1945, as quoted *id.* at 11.)

But it can hardly be doubted that fear of the censor has prevented the screen's growth to full maturity as a medium of expression. As Daryl Zanuck has put it in *Treasury for the Free World* (as quoted *id.* at 17):

"Let me be blunt. The fear of political reprisal and prosecution has been a mill stone around the neck of the industry for many years. It has prevented free expression on the screen and retarded its development. The loss has not been merely our own. It has been the nation's and the world's. Few of us insiders can forget that shortly before Pearl Harbor the entire motion picture industry was called on the carpet in Washington by a Senate committee dominated by isolationists and asked to render an account of its activities. We were pilloried with the accusation that we were allegedly making anti-Nazi films which might be offensive to Germany."

It has been frequently recognized in Congress that motion pictures are more than mere entertainment, that, indeed, they have much educational and propagandistic content. As early as 1922, a Senate Resolution (S. Res. 142) was introduced by Senator Myers to investigate the political activities of motion picture producers (62 Cong. Rec. 5621). Interestingly enough, he recognized that "It (the motion picture) may furnish not only amusement but education of a high order" (62 Cong. Rec. 9655, 9656), arguing that it is the duty of the state to see that people are educated "correctly" (*id.* at 9657). Congressman Black recognized as early as 1929 that motion picture censorship is prohibited by the First Amendment, in giving this as the reason why Congress had not enacted such censorship laws (70 Cong. Rec. 3554). In 1942, two Resolutions were introduced into Congress to investigate war propaganda in the movies

(S. Res. 152, H. Res. 292, reported respectively at 87 Cong. Rec. 6565 and 6903). A third Resolution, H. Res. 107, was also introduced to investigate the industry generally. Perhaps Congress was especially aware that year of the ideational content of motion pictures because that year a film, "An Adventure in Washington", severely critical of Congress, was exhibited and drew Congressional notice (87 Cong. Rec. 4231). (The film dealt with apparent tolerance by the Senate of hooliganism practised by its pageboys.) In 1947, Senator Martin commented on education through the medium of the motion picture (93 Cong. Rec. 9000), and that same year, a subcommittee of the House Committee on UnAmerican Activities reported on Communist influence in the motion picture industry (93 Cong. Rec. A2687). The House Committee has been sporadically investigating Hollywood ever since.

Unless, then, the First Amendment is to be restricted to Eighteenth Century media of communication, along with the hand press that first printed it, its protection must be extended to the media of communication which the technology of our age has developed. The hand press is protected because it can be a conveyance of ideas to numbers of people. The so-called "mass media," and specifically motion pictures, must be protected just because they are more effective, more graphic and reach a wider audience.

More so than with the hand press, the guarantee of freedom must protect motion pictures not only in the interest of our society—the interest of those who see and hear—but also in the interest of the producers. Because of the great investment needed to use this medium, it is susceptible to the censor's slightest whisper. The investment is usually safest when its product carries the least innovating message. The slightest threat by previous

administrative restraint enervates the spirit of freedom which must instead be nourished if this giant descendant of the hand press is to advance "truth, science, morality and arts in general." Cf. Donnelly, *Government and Freedom of the Press*, 45 Ill. L. Rev. 31 (1950).

Today the *Mutual Film* case is as anachronistic as the nickelodeon. It endangers the very principle of freedom by its emphasis on the mechanism rather than the function of the press.

**C. The New York State Censorship Law establishes a previous administrative restraint, the form of restraint which inevitably and most completely violates the freedom of the press.**

With the *Mutual Film* case laid to rest, it follows that the censorship law here involved must be held invalid on its face.

Such a result is compelled by the First Amendment, for, as stated by this Court (*Thornhill v. Alabama, supra*, 97):

"\* \* \* Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider v. State*, 308 U. S. 147, 162-165; *Hague v. C.I.O.*, 307 U. S. 496, 516; *Lovell v. Griffin*, 303 U. S. 444, 451. The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the

censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near v. Minnesota*, 283 U. S. 697, 713."

Thus the freedom-of-press guarantee of the First Amendment is aimed, first of all, against licensing the dissemination of material. This does not exhaust the guarantee, but is its minimum compulsion. As Justice Holmes said, dissenting in *Leach v. Carlile*, 258 U. S. 138, 141 (1922):

"Even those who interpret the (First) Amendment most strictly agree that it was intended to prevent previous restraints."

The previous administrative restraint here established is repugnant to the First and Fourteenth Amendments because by it the repression of unconventional ideas is made immeasurably extensive. No restriction could be more sweeping in its effect. Every motion picture must be submitted to a censor at whose discretion its public exhibition may be barred. Therefore, even if a judicial remedy for the abuse of the censor's power is available, such a previous restraint upon speech and press is inadmissible. *Cantwell v. Connecticut*, 310 U. S. 296, 306 (1940); *Largent v. Texas*, 318 U. S. 418, 422 (1943).

Moreover, since the reach of whatever discretion is granted a censor cannot be controlled save by judicial review, administrative restraint in advance of exhibition in any case must result in effective suppression for some period of time. The threat of postponement of exhibition effectively abridges the protected freedom. And, as with

other forms of publication, the right to timely release of motion pictures is an important part of that freedom.\* See *United States v. Paramount Pictures*, *supra*, at 167.

The unusual situation found in the instant case, in which the Board of Regents revoked the license two years after its original issuance, points to an additional evil. Whatever protection or assurance might be given to the producer of a film by its original licensing, means absolutely nothing whatsoever, if at any time thereafter the Board might revoke that license—a most substantial impediment to the production of controversial movies. The opinion of the Appellate Division held it proper for the Board to consider “complaints received” as evidence to be relied upon. The Board is thus left to be pushed by the winds of opinion, to be continuously in the anomalous position of having to take the risk of offending either a private group or the vast majority of the public. As this case demonstrates, a motion picture censorship board is at the mercy of pressure groups.

Surely, the instant case presents the classic example of previous administrative restraint frankly aimed at the suppression of ideas. Laws and ordinances in many forms which merely obliquely approach such absolute censorship have repeatedly been struck down by this Court. It cannot be imagined that a law submitting such products of the printing press, as newspaper columns or novels to all-inclusive pre-publication supervision by a state agency could be proposed in the United States, let alone defended or tolerated by the First Amendment. Such censorship can have no constitutional application or existence, as this Court has repeatedly and unanimously held. *Largent*

---

\* This doctrine had not been developed before the *Mutual Film* case was decided, when this Court stated (236 U.S. at 242) that “however educational or entertaining, there is no impediment to their value or effect in the Ohio statute.”

v. Texas, *supra*, and the cases there cited; see *American Communications Association v. Douds*, 339 U. S. 382, fn. 18 (1950). To permit such pre-censorship of motion pictures would be to render nugatory the First Amendment, to hold that the Constitution cannot keep pace with modern technology.

The *Mutual Film* case went so far as to indicate that any theatrical production was subject to pre-censorship, whether on stage or screen.\* The *ratio decidendi* was that such "spectacles" are just a business for profit and that they are seen by mixed audiences of males and females, children and adults. The first theory is no longer tenable today, in view of the *Winters*, *Hannegan*, and *Paramount Pictures* cases. The second theory must fall as a matter of law and logic, even were it not rendered nugatory by this Court's dictum in *Paramount Pictures*. This for three reasons: 1) All speeches and assemblies are composed of mixed audiences, and surely are not subject to licensing for this reason. 2) There is no proof whatsoever that "harmful" material is rendered more potent because viewed in a mixed audience; on the contrary, the presence of adults with children would seem to render this "evil" least potent than "evil" material read secretly by a child. Moreover, the high prices charged for motion picture admission would minimize the possibility of children seeing movies without parental approval. 3) There is no reason whatsoever to suppose that the ordinary criminal law of obscenity or such prevalent

---

\* It could hardly be argued that this Court would today permit any attempt at pre-censorship of the theatre. Yet the imminence of full-length three-dimensional motion pictures (N. Y. Herald Tribune, March 25, 1952, p. 19, col. 5) indicates that there will soon be no real difference between stage plays and motion pictures in the eyes of the viewers thereof. It would be highly anomalous indeed if one-dimensional movies were to be subject to censorship, but not three-dimensional ones.

statutes as Section 722 of the New York Penal Law cannot deal with any "evils" produced by any motion picture less effectively than they can deal with similar "evils" produced by printed material. The availability of these other remedies makes unconstitutional this extraordinary remedy. *Thornhill v. Alabama*, 310 U. S. 88, 95-96.

The First Amendment protects the distributor of handbills, of detective magazines, and the speaker whose unaided voice attracts ten listeners in a park. In a time of many remarkable innovations in means of communication, regard for the principles of the First Amendment must reject an interpretation of "press" in terms of form rather than substance.

\* \* \* \*

The *Mutual Film* decision is today nothing more than an anomalous shade. What substance it may once have had has long since been sapped by recognition that the First Amendment through the Fourteenth limits state power. What vitality it may once have had has been negated by the clear implication of the many cases in which measures licensing the dissemination of ideas have constitutionally been condemned. Its authority has been denied, although *obiter*, nevertheless specifically, by this Court itself. The *Mutual Film* decision should now finally be declared obsolete.

## POINT II

**The law permitting revocation or denial of a license because of a finding that a film is "sacrilegious" constitutes a law respecting an establishment of religion and a prohibition of free exercise thereof in violation of the First and Fourteenth Amendments to the United States Constitution.**

### A. The Constitutional Issue.

This Court has repeatedly held that the prohibition against laws respecting an establishment of religion and prohibiting the free exercise thereof imposed upon Congress by the First Amendment is made applicable to the states by the Fourteenth. *Everson v. Board of Education of Township of Ewing*, 330 U. S. 1 (1947); *McCollum v. Board of Education*, 333 U. S. 203 (1948); *Cantwell v. Connecticut*, 310 U. S. 296 (1939); *W. Va. State Board of Education v. Barnette*, 319 U. S. 624 (1943).

In the first two cases listed above, this Court carefully spelled out the implications of the two Amendments. The Court stated:

“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form

they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' *Everson case, supra*, 330 U. S. at 15-16; *McCollum case, supra*, 333 U. S. at 210-211.

This standard, we submit, requires invalidation of Section 122 of the Education law insofar as it prohibits the exhibition of "sacrilegious films." Examination of this statute as interpreted in the decision by the Court of Appeals below establishes that its purpose is to "aid all religions," "aid one religion" and "prefer one religion" over others. By the suppression of motion pictures found to be "sacrilegious," Section 122 inflicts punishment for "entertaining or professing religious beliefs or disbeliefs." Finally, by requiring state agencies to pass upon the religious propriety of motion pictures, Section 122 of the Education law necessarily compels the state to intervene in sectarian religious affairs in contravention of the mandate of the First Amendment.

### B. Sacrilege and Heresy.

#### (1) *Definition of "Sacrilege" by Court of Appeals.*

Section 122 of the Education Law provides for the withholding of licenses by appropriate state authorities from any film which is determined to be "sacrilegious." We assume that the definition of "sacrilege" by the Court of Appeals below, as the highest court in the State of New York, is conclusive here. We submit, nonetheless, that it is pertinent to note the degree to which the opinion below departed from the original meaning of the word to

support the ban placed by the Board of Regents on this film. The difficulties encountered in formulating a relevant definition of "sacrilege" derive from the fact that the only offense of which "The Miracle" is properly guilty is the offense of heresy.

Research has disclosed no American court decision prior to this case which has defined "sacrilege." In virtually all the definitions offered by standard dictionaries, the term "sacrilege" is restricted to the profanation or desecration of *physical objects* dedicated to religious purposes. *Webster's New International Dictionary of the English Language*, 2nd Ed. (1940); *Black, Dictionary of Law*, 3rd Ed. (1933); *Bouvier, Standard Law Dictionary*; *Abbott, Dictionary of Words and Phrases*. The only judicial construction of the term "sacrilege" which has been found in the English cases similarly limits its meaning. (7 and 8 Geo. IV, Ch. 29, Sec. 101; 24 and 25 Vict. Ch. 95, Sec. 1, 19.) In upholding the revocation of licenses, however, the Court of Appeals sought support in one of the definitions found in the Funk and Wagnalls Dictionary—cited as its sole authority—defining sacrilege as "the act of violating or profaning anything sacred" (R. 51). We suggest that emphasis properly belongs on the word "thing." With no further explanation the Court says elsewhere in its opinion that the prohibition of sacrilege means "simply this: that no religion, as that word is understood by the ordinary, reasonable person shall be treated with contempt, mockery, scorn and ridicule \* \* \*" (R. 154).

As we shall show later, this definition is still fatally vague and ambiguous. But whatever its precise meaning, it is questionable whether even in its own terms it is applicable to the present case. The record discloses that some Roman Catholic clergy found the film offensive while

responsible spokesmen for Protestant and Jewish religious groups found the film not only unoffensive but profoundly religious (R. 44-45, 96-144). At most, the film offends only those committed to a single distinctive theology. "The Miracle" has been banned because it is non-conforming, not because it is irreligious.

**(2) *The decision below in fact involves suppression of heresy.***

Blackstone defines heresy as "An offense against religion, consisting not in total denial of Christianity, but of some of its essential doctrines publicly and obstinately avowed." IV. *Blackstone's Commentaries*, 44, 45. The most that can and has been charged is that "The Miracle" is a satirical comment on the dogma of the Virgin Birth of Christ. We shall not here attempt to argue whether the specific incidents of the film sustain this charge. We assume, *arguendo*, that they can be so found by some religious groups. Under the terms of the definition suggested by the Court of Appeals itself, however, this is not enough. In the opinion below, the Court clearly declared that in order to sustain the prohibition of any film under Section 122 it must first be established that a "religion" as that word is ordinarily understood has been dealt with contemptuously. This does not mean that a film may be prohibited whenever it is deemed offensive to some special tenet of an orthodoxy. The definition offered by the Court does not require that each of the specific theological assumptions of a particular creed be made immune from examination or criticism.

Unlike its language, however, the Court's decision requires exactly that. Literal acceptance of the New Testament account of the Virgin birth which allegedly has been satirized is not the essential dogma even of all creeds.

within Christianity. This is apparent in the remarks of a past Chief Justice of this Court and one-time President of the United States, William Howard Taft, who included himself among those observant and practicing Christians who "deny that they lose the essence of Christianity when they give up miracles, the Virgin birth and the deity of Jesus." Taft, *The Religious Convictions of an American Citizen*, cited in Swancara, *The Separation of Religion and Government* (1950). Exactly that attitude for which "The Miracle" has here been penalized was expressed by another President of the United States, Thomas Jefferson, in a letter to John Adams. Jefferson wrote: "The day will come when the mystical generation of Jesus, by the Supreme Being as his father, in the womb of a virgin, will be classed with the fable of the generation of Minerva in the brain of Jupiter." Jefferson, *Memoir, Correspondence and Miscellanies*, edited by Thomas Jefferson Randolph (1829), Vol. IV, p. 365. Significantly, in this same letter, Jefferson remarked that he was compelled to reject Calvin's teachings because "He was an atheist, which I can never be." *Ibid.* In the light of his efforts to evolve constitutional principles which would separate the realm of the Church from the realm of government, Jefferson doubtless would have been astounded to learn that in 1951, in the State of New York, a dramatic presentation of his views would be forbidden by the State as dangerously irreligious.

By banning "The Miracle" the Court below moved away from the protection of religious liberty and assumed a new function: that of underwriting and guaranteeing the perpetuation of particular beliefs by expunging and prohibiting heretical expressions. However we may feel about the special protection of religious groups against slanderous assault, we cannot accept the principle that their

articles of faith, their dogmas, are to be similarly protected. Whatever this Court may hold in *Beauharnais v. Illinois*, No. 118, U. S. Sup. Ct. (Oct. Term, 1951), we submit that it is one thing when verbal attacks are made upon a *class qua class*, identifiable by race or religion, quite another thing when attacks are made upon the *beliefs* of such a class. To forbid criticism of beliefs would be completely to emasculate the First Amendment.

That we are dealing here with heresy rather than "sacrilege" is evidenced by the fact that "The Miracle" does not engage in a general denunciation of religion. It has already been noted that no spokesman for any religious group other than the Catholic Church has protested the showing of this picture. Significantly the reaction even of Catholics has not been uniform. Those charged with responsibility for reviewing and criticizing motion pictures on behalf of Catholic organizations have been by no means unanimous in their attitude toward the film and some have even been outspoken in their affirmation of its honesty, its sincerity and its high moral and artistic calibre. See Appellant's brief, page 7.

**(3) Once begun, state suppression of heretical views requires a boundless inquisition into religious views.**

Use by the state of its authority for the proscription of heretical religious views represents a point of no return. Once reached, the State will be compelled to censor every motion picture which any one of the hundreds of orthodoxies in our population finds offensive. In his concurring opinion in the *McCollum* case (*McCollum v. Board of Education, supra*, 333 U. S. at 235), Mr. Justice Jackson warned this Court that:

"Authorities list 256 separate and substantial religious bodies to exist in continental United

States. Each of them . . . has as good a right as this plaintiff to demand that the courts compel the schools to sift within their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds."

Mr. Justice Jackson found this danger even in the public schools where it must be weighed against the unquestionable obligation of the state to supervise the details of curricula and to protect the unformed minds of children against prejudice by sectarian or biased information. How much greater is the danger in the general public forum where the state has no such obligation and where, indeed, efforts to extend such protection are denied and forbidden by the First Amendment.

In the wake of the decision below we may expect that—with as much cogency as the case at bar—other films will be similarly suppressed because of their supposed antipathy to religious principle. Catholic religious groups, speaking through the quasi-official ecclesiastical authority of the Legion of Decency ("Vigilanti Cura," Encyclical Letter of Pius XI, June 29, 1936), have condemned a wide variety of films. These have included *Repeat Performance*, *Life With Father*, *The Bishop's Wife*, *The Miracle on 34th Street*, *Mom and Dad*, *Carnival in Flanders*, *Private Life of Henry VIII*, *Rasputin*, *Volpone*, *Streetcar Named Desire*, and *The Young and the Damned*. For complete list, see Feature Motion Pictures Reviewed by the New York Office of the Legion of Decency (Vols. 1936-1950), distributed by the National Legion.\* This follows

---

\* We are not here opposing the compilation of such lists *per se*. Each group is free to condemn or approve such works as it wishes. We do object, however, to the utilization of these lists by governmental

inevitably from the fact that the function of a religious creed is to encompass in an intimate and direct way the manifold activities of daily existence. Religious beliefs are not expressed only during ritualistic observances; they are not invoked solely during devotional services. To many, religion is an integrating principle designed to inform and deal with daily conduct and to be implicit in everyday behavior. It is no easy task, therefore, to separate events which impinge upon religious beliefs from those which do not; nor will it be an easy task to separate those films which heretically intrude upon religious beliefs from those which do not.

It is appropriate to note that the motion picture *Gentlemen's Agreement*, dealing with the problem of anti-Semitism and generally regarded as possessing sociological rather than religious connotations, was banned by the Film Censorship Board in Madrid, Spain, because of "theological error." *Gentlemen's Agreement* was barred by the vote of the ecclesiastical member of the Spanish Film Censorship Board, not by the vote of the representatives of the secular arm of the state who also serve on that Board. It was suppressed because the solutions it reached and the scenes and situations it presented were

authorities and to the incorporation of the judgments they contain into the official policy judgments of the state. The criteria private groups employ most frequently are not the criteria upon which the state is compelled to rely under the First and Fourteenth Amendments. Sectarian evaluations made by religious organizations may not simply be taken over whole and adopted by the non-sectarian agencies of government. We submit that, in essence, this occurred in the banning of "The Miracle." That it is not an isolated instance is reflected in the remarks of a spokesman for the Providence, Rhode Island Bureau of Police and Fire following the suppression of the film "The Blue Angel": "If the Legion of Decency condemns a picture, we'll condemn a picture. We go along with the Legion and we'll continue to go along with it." *New York Times*, February 22, 1951.

interpreted as "grievous sin" and as an affront and an attack upon the doctrinal assumptions of Catholicism.\*

It is true that this finding was repudiated by statements issued on behalf of Cardinal Spellman by the Chancery Office of the New York Archdiocese and by other leading Roman Catholic churchmen. *New York Times*, October 1, 1948. The fact remains, however, that if high ecclesiastical spokesmen invested with authority by a recognized religious body can denounce a film as "sacrilegious" and forbid its exhibition because the picture espouses so non-controversial a view as religious tolerance, we may feel certain that films disagreeing with the attitudes of religious groups on any one of other significant social and family relations issues will also be found sacrilegious. Church groups are deeply committed on these issues. Many areas of apparently general social concern are charged with an emotional potency born of religious zeal.

The invitation to promiscuous censorship implicit in the decision below is magnified by the fact that "The Miracle" does not itself expressly criticize any religious dogma. It is a completely fictional presentation. At most, any satiric comment it may contain is stated symbolically and by analogy. Similarly, though they make no direct, specific statements about religious principle, it is equally reasonable to believe that films which depict divorced couples as successfully resuming their individual lives, or which implicitly urge the use of contraceptive methods as socially

---

\* Among the errors attributed to the film by the Censorship Board was the picture's suggestion "that a Christian is not superior to a Jew and that to state the contrary is to accept poison that is instilled by millions of parents into the minds of millions of children." Another of the points to which the Board objected was that the film "says that for many Jews it is a matter of pride to be called Jews. Pride of what? The pride of being the people who put God to death? Of being perfidious, as they are called in the Holy Scripture?" *New York Times*, September 30, 1948.

or eugenically desirable, or which present progressive education in complimentary terms, or which endorse psychoanalysis, may all be interpreted, by analogy, as invidious assaults upon religious dogma, censorable under the terms of Section 122 as construed by the Court below.

These issues are not, of course, before this Court at this time. But they are not far around the corner if judicial arbitration on matters of sacrilege and conformity is here condoned. Religious groups of all denominations have generally refrained from urging state prohibition of statements hostile to their faith. This is not because they have not often felt themselves aggrieved. It is rather because they have been brought to recognize that if we are to preserve religious freedom the force and authority of the state may not be joined to compel solutions to what are at bottom religious differences and religious disputes. The decision of the Court below will do much to upset this willingness to respect the impartiality and neutrality of government. Once opened, this Pandora's box of religious contention will not again readily be sealed.\*

---

\* Counsel for the American Jewish Congress who are participating in the preparation of this brief recently consulted with leaders of national rabbinical organizations with respect to objections asserted by religious authorities to the treatment of Jewish theological conceptions in "David and Bathsheba," a motion picture now enjoying wide commercial success and wide public distribution. Rabbinical spokesmen maintain that "David and Bathsheba" represents Jewish religious convictions in a manner which, in effect, is blasphemous. The Jewish God is depicted as embodying a Deity bent upon vengeance and devoid of compassion. By implication this alleged Jewish theological principle is unfavorably compared with the God of Christianity, represented as a Lord of infinite mercy. Jewish religious leaders have taken strong exception to this defamation of the Jewish God. Despite the real resentment incited by this film, however, and despite the real insult which Jewish religious leaders feel their beliefs to have sustained, the American Jewish Congress together with other national Jewish organizations counseled against any effort to take recourse to the censorship or licensing bodies of the State as a means of prohibiting

**(4) Heresy and Religious Liberty.**

The extent to which the State is thrust into the heart of religious conflict by undertaking to pass upon statements in terms of their "sacrilegious" qualities is clearly illustrated by the attitude of the various religious creeds to the story of the Crucifixion of Christ. Within recent years any number of commercial motion pictures have been produced and publicly exhibited which relate in detailed and graphic terms an account of the New Testament version of the death and betrayal of Christ. Almost without exception these films have portrayed the Jews of the time of Christ as sadistic, brutal and degraded. Because of its rejection of Christ as Savior—because of its theological position—the Jewish community by implication is vilified and bitterly accused.

The Crucifixion story, however, remains a vital and integral part of the doctrinal systems of many sects within Christianity. Although the historicity of Jewish responsibility for the Crucifixion has been repudiated by responsible scholars (*Zeitlin, Who Crucified Jesus? (1942)*), no one has suggested that the presentation of this story be in any way curbed, altered or censored through the intervention of the state. Meanwhile the injury these films inflict is far more grave than the mocking or ridicule which disturbed the Court below. To many leading thinkers of all religious persuasions the Crucifixion story in itself has

---

the exhibition of this film or any of its sequences. This position was adopted and accepted because of a consensus that, whatever may be the right of religious organizations to make private representations to motion picture producers or to individual artists to inform them of religious objections to proposed films, certainly there exists no right to involve the State in an attempt to exploit its coercive machinery for sectarian ends. The opinion below, however, utterly destroys the rationale of this consensus. If here sustained, other faiths will no longer have reason not to avail themselves of the same protection which the Court below has granted to Catholic religious beliefs.

intensified anti-Semitism and stimulated the growth of profound religious hatred.\*

Because of their reliance upon sectarian dogma the Crucifixion films usually revile and deride Jewish religious beliefs. It is estimated that these films are shown commercially in at least 100 different communities annually. See, *An Analysis of Crucifixion Films*, prepared by the American Jewish Committee, on file at the offices of the American Jewish Congress, 15 East 84th Street, New York, N. Y. They invariably fall within the definition of "sacrilegious" as set out by the Court of Appeals. Does this mean, then, that Crucifixion films may no longer be exhibited within the State of New York? Or that they may be shown only on

---

\* In an analysis of anti-Semitism by Isacque Graeber appearing in the *Social Action Magazine* for January 15, 1946, published by the Council for Social Action of the Congregational Christian Churches, the following comments are made:

"James Parkes, in his masterly book, *The Conflict of the Church with the Synagogue*, has laid bare what he elsewhere calls the tap root of anti-Semitism, the cause without which there might never have been any such display of ill-feeling at all. He shows that it was the teaching of the Christian Church which put into words the first definite recognition of a ground of enmity on the part of Christians against the Jews. The ground of enmity was that the Jews had rejected Christ and killed him, and had persisted in their refusal to accept him ever since. While permitted to survive until Christ's Second Coming, they were fated to live in a station suitable to a people steeped in guilt \* \* \* the part played by the Christian Church consisted in clearly defining for the first time the charges against the Jews and implementing action on the basis of those charges. Stated in elementary terms it is the view of the Jew as a Christ Killer. According to this view, the Jews bear the guilt for the rejection of Jesus as the Christ and for his crucifixion. These two charges formed a standing indictment against the Jews for all subsequent ages. The charge of rejecting Christ could be disarmed by conversion and baptism. The charge of having killed Christ could never be withdrawn or denied. On the strength of these two charges, the Jews were to be regarded as a people accursed forever, outside the pale of Christian fellowship and exposed to the perpetual wrath of God."

condition that they depart from the sincere beliefs of many Christian denominations? In the absence of any incitement to disorder could the State suppress the showing of Crucifixion films and yet claim to guarantee religious liberty?

On the other hand, the Talmud, a work of pre-eminent value and importance to Jews, has been held by members of other faiths to be totally blasphemous and irreligious. Professor Solomon Grayzel of Dropsie College reports that a number of times in the past, at the direction of Papal authorities, the Talmud was publicly burned because, in the words of Gregory IX, it "contains matter so abusive and so unspeakable that it arouses shame in those who mention it and horror in those who hear it" (Letter from Gregory IX to the King of France, June 9, 1239, quoted in Grayzel, *The Church and the Jews in the XIIIth Century*, (1933) p. 241), and because, in the words of Innocent IV, "In it are found blasphemies against God and His Christ, and obviously entangled fables about the Blessed Virgin, and abusive errors, and unheard of follies." Letter from Innocent IV to the King of France, May 9, 1244, quoted in Grayzel, *op. cit.*, *supra*, at p. 251. Does this mean, therefore, that a film in which the teachings of the Talmud are favorably and sympathetically presented or in which the Talmud and its teachings are extolled, would be denied exhibition in New York under Section 122 on the ground that to some religious leaders it might be "sacrilegious?" And if this is the case, as is implied by the opinion below, then what remains of religious freedom?

To insure religious liberty our constitution clearly disqualifies any government agency from functioning as ecclesiastical arbiter. The courts repeatedly repudiate attempts to induce them to abandon their neutrality and to arbitrate between contending religious views. In 1869, this Court declared without qualification that "the law knows no

heresy and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 80 U. S. 679, 728 (1869). Knowing no heresy, the law obviously can define no orthodoxy. It is beyond the competency of civil government to describe norms of religious conduct. "If there is one fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodoxy in . . . religion, or other matters of opinion . . ." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 at 642 (1943). Every individual in the community remains free "to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution . . . Religious expressions which are as real as life to some may be incomprehensible to others." *U. S. v. Ballard*, 322 U. S. 78, 86 (1943).

We respectfully submit that our legal system can not pass upon orthodoxy nor can it pass upon heterodoxy; that state authorities can not affirmatively assist religion nor can they suppress criticism of religion; that governmental authorities are constitutionally precluded from sitting in judgment upon religious doctrine nor may they, under the subterfuge of licensing arrangements, seek to distinguish between concepts which are religiously "proper" or "improper", "pious" or "impious", "religious" or "sacrilegious".

"Our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others, but it does me no injury for my neighbor to say there are twenty Gods, or no God. It neither picks my pocket nor

breaks my leg." Thomas Jefferson, *Notes on Virginia*, cited in Blau, *Cornerstones of Religious Freedom in America*, p. 78.

The line which separates orthodoxy from "sacrilege" is wavering and ambiguous. It cannot be drawn with certainty, even by those who, by virtue of thorough religious training, might normally be thought best qualified in this endeavor. Secular authority cannot possibly arrogate to itself the function of separating the religiously permissible from the religiously impermissible. All that it can or should do is to permit free expression of all points of view in the conviction that ultimately those attitudes which are healthy and genuine must prevail. The ways of censorship are boundless and its objectives uncertain. To avoid endless embroilment in religious contention the state must exercise a scrupulous and unrelenting neutrality.

The inherent danger to religious freedom is not significantly reduced when, as in the opinion below, opinions critical of religious faiths are prescribed only when they are found mocking or abusive. The awareness of this Court of the need for freedom of religious expression even when it entails violent disparagement of other faiths has been illustrated time and time again. In *Douglas v. City of Jeannette*, 319 U. S. 157 (1943) the teachings of the Jehovah's Witnesses were held privileged. As typical of those teachings Mr. Justice Jackson in his concurring opinion cited the following excerpts from the volume "Enemies," by J. F. Rutherford:

"There are numerous systems of religion, but the most subtle, fraudulent and injurious to humankind is that which is generally labeled the 'Christian religion,' because it has the appearance of a worshipful devotion to the Supreme Being, and thereby easily misleads many honest and sincere persons

(the Roman Catholic hierarchy) is the great racket, a racket that is greater than all other rackets combined. Referring now to the Scriptural definition of harlot, what religious system exactly fits the prophecies recorded in God's word? There is but one answer, and that is, the Roman Catholic Church organization. As those close or nearby and dependent upon the main organization, being of the same stripe, picture the Jewish and Protestant clergy and other allies of the Hierarchy who tag along behind the Hierarchy at the present time to do the bidding or the old 'whore'. Says the prophet of Jehovah: 'It shall come to pass in that day, that Tyre (modern Tyre, the Roman Catholic Hierarchy organization) shall be forgotten.' Forgotten by whom? By her former illicit paramours who have committed fornication with her." *Id.* at 171.

Similarly in *Cantwell v. Connecticut*, 310 U. S. 296, broadcasting phonograph records over a public address system on the public streets denouncing the Roman Catholic Church as "an instrument of Satan" was held protected by the First Amendment. And in *Kunz v. New York*, 340 U. S. 290, this Court extended the guarantees of the First Amendment to an address delivered on the streets of New York vilifying Jews as "Christ-Killers," and the Pope as "the Anti-Christ." "The Miracle" surely must be held less abusive than any of these.

However regrettable, the religious tenets of every sect are at times intemperately and radically criticized by those of competing religious faiths. This has been true since Biblical times. When Elijah debated the prophets of Baal on Mount Carmel he challenged them to make their god manifest. Significantly, the Book of Kings notes that when Baal failed to reveal himself, Elijah ridiculed and

jeered at the priests and made a mockery of their deity: "And \* \* \* Elijah mocked at them, and said, Cry aloud; for he is a God: either he is musing, or he is gone aside, or he is on a journey, or peradventure he sleepeth and must be awaked." 1. Kings 18.27. In like vein, the authors of the King James version of the Holy Bible found it necessary to refer to the Pope in the preface to their work as "that man of Sin," a remark which ever since has made the King James Bible abhorrent to members of the Roman Catholic Church. Satire and ridicule are often found in religious argument. A vital part of one's freedom to practice one's religion is the freedom to combat any religious error, and, indeed, to reveal opposing religious views as ridiculous and absurd. As this Court noted in *Cantwell v. Connecticut*, 310 U. S. at 310:

"In the realm of religious faith, and that of political belief, sharp differences arise. In both fields the tenets of one may seem the rankest error to his neighbor. To persuade others to his own point of view the pleader, as we know, at times, resorts to exaggeration, to vilification \* \* \*, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

It is no answer to say, as the Court below has declared, that freedom of religion is not impaired by Section 122 of the Education law because other sections of the statute exempt religious presentations "as ordinarily understood" from the licensing provisions. Actually, no such exemption exists. The Board of Regents has provided by

regulation that no permit may be issued to *any* film found to be "obscene, indecent, immoral, sacrilegious . . . ." (Rules and regulations for review and licensing of motion pictures, issued by the Board of Regents of the University of the State of New York, Regents Rules, paragraph 244.) Thus in this respect the same requirements must be met by films exhibited for religious and educational purposes as by films shown for any other purpose. Moreover, the Court below was quick to recognize the religious implications of "The Miracle," a film which could hardly be considered as addressing itself directly to theological or religious matters. If state statutes permit free expression of religious beliefs only when they come properly packaged and labeled and only when they are made the primary object of a formal "religious presentation," then we are not enjoying freedom of belief as contemplated by the framers of the First Amendment. It is well understood that religious ideas are not expressed or expressible only in formal documentary statements of conviction. Frequently they find their outlet in artistic works which fulfill other functions.

"Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational point of view of religion in these guises is often stronger than in forthright sermon. \* \* \* The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples." Justice Jackson concurring in *McCollum v. Board of Education*, *supra*, 333 U. S. at 236.

To permit the freedom of dissenting religious belief only when it comes properly stamped, is to deprive it of the freedom guaranteed by our Constitution. Special protection of some religious views by prohibition of contradictory views must be regarded, as it always has been regarded, as the suppression of heresy.

Heresy is clearly outside the scope of secular law. Even in England, where there exists a formally established church, heresy "is now subject only to ecclesiastic correction and is no longer subject to punishment by the secular law." 4 *Stephen's Commentaries*, 233. Surely in the United States, given the requirements and limitations of the First Amendment, neither the authority of the courts nor of any agency of the state may be harnessed to an inquisition into or suppression of heretical belief.

### C. Sacrilege and Blasphemy.

Even if we assume that no question of heresy is here involved we must nevertheless find that Section 122 of the Education law is properly analogous to legislation in other jurisdictions regulating blasphemous statements. License Commissioner Edward McCaffrey of New York City first sought to revoke the license of "The Miracle" because he found it "officially and personally blasphemous" (*New York Times*, Dec. 24, 1950); moreover the definition of "sacrilege" as used in Section 122 by the Court below as meaning the profaning or ridiculing of religion coincides exactly with the definition of blasphemy in other states. (Blasphemy is: " \* \* \* maliciously reviling God or religion," *People v. Ruggles*, N. Y. 8 Johns. 290, 292 (1811); " \* \* \* exposing [God or the Holy Scriptures as contained in the Old and New Testament] to contempt and ridicule," *State v. Mockus*, 120 Me. 84, 91 (1921); " \* \* \* the expression of defiant impiety and irreverence

against God or things held sacred," Funk and Wagnall's *New Standard Dictionary of the English Language* (1935). See also *Commonwealth v. Kneeland*, 37 Mass. 206, 213 (1836); *Updegraph v. Commonwealth*, 11 S & R (Pa.) 394 (1824).) We submit that Section 122, like all other blasphemy statutes, is unconstitutional.

**(1) Suppression of blasphemy as an aid to established religion.**

Laws penalizing the expression of irreligious and blasphemous views have their inception in efforts to protect and aid religion. Historically, their sole reason for being has been that they contribute to precisely that kind of establishment of religion which is forbidden under our Federal Constitution.\* The early common law plainly regarded blasphemy as an offshoot of and complement to the crimes of apostasy and heresy, crimes which ordinarily had no place in temporal courts.\*\* All of these crimes

\* Because of Blackstone's formulation of blasphemy as a common law offense (See Chitty's *Blackstone*, Vol. IV, p. 42), it may mistakenly be assumed that early common law courts took ready jurisdiction of blasphemy as an offense properly cognizable in civil courts. On the contrary, examination of the historical development of the concept discloses that originally blasphemy was the exclusive concern of the ecclesiastical courts and for centuries was held to be without secular implication. Nokes, *Crime of Blasphemy* (1928), 1-20. The temporal courts, both civil and criminal, accepted jurisdiction in this field only tentatively and reluctantly, recognizing at all times the overriding interest of the church and its exclusive competence in deciding questions involving allegedly irreligious statements. *Davis v. Gardiner*, 4 Coke 16b (1593); *Bury v. Chappell*, Gould, 135; *Ireland v. Smith*, 1 Br. & Gold. 12.

\*\* *Palmer v. Thorpe*, 4 Coke 20a; *Specot's Case*, 5 Coke at 57b; *Nicholson v. Lyne*, Cro. Eliz. 94; *Halwood v. Hopkins*, Cro. Eliz. 787. Blasphemy, in the early English common law, was viewed merely as a form of heresy, that is, dissent from the established religion. Despite the attempts of some early common law lawyers to distinguish between cases involving heresy and cases involving blasphemy (See Cobbett, *Parliamentary History of England*

were regarded as of a piece; all of them plunged the secular court into difficult theological disputation; all of them were conceived in an effort to preserve inviolate the dogmas of established religion; and all of them—but for the fusion of the Anglican Church with the monarchy of England—would have been excluded from the common law.\*

Not until 1676, did there appear the first reported instance at common law in which the words complained of were alleged by the prosecution to be blasphemous and were explicitly declared by the court to be blasphemous.

---

(1808-20), xvi 325; Odgers, *A Digest of the Law of Libel and Slander* (1911), 486), the common law itself never evolved such a distinction (Nokes, *op. cit. supra* at p. 78). The definitions of blasphemy accepted at the time of the development of the concept as a punishable offense in English courts were sufficiently broad (Lyndwood, *Provinciale* (1679) at 55) to permit heretical offenses to be subsumed under that classification. See, for example Godolphin, *Reportorium Canonicum* (1687) at 560: Lyndwood, *op. cit. supra*, at 295; Lane's Case (1631), Reports of Cases in the Courts of Star Chamber and High Commission (C. S. 1886), 188, 190, 193.

\* Early intervention by non-religious courts in actions involving blasphemy was wholly administrative. The sole function of the secular arm was that of "policemen—but nothing more." Nokes, *op. cit. supra*, p. 4. Temporal courts operated only to arrest and detain accused persons and to punish those convicted by the ecclesiastical tribunal. Deliberately, common law judges refrained from adjudicating substantive issues involving blasphemy, insisting that these issues remain the exclusive domain of religious authorities. 2 Stephen, *History of Common Law*, 443. This reluctance of the common law to sit in judgment over blasphemous matters, and the identification and equation by the great common law judges of blasphemy and heresy is evident even in the writings of Coke. Although notoriously anxious to enlarge the scope of common law jurisdiction at the expense of spiritual authority, he nevertheless conceded: "And as in temporal causes, the King, by the mouth of the Judges in his courts of Justice doth judge and determine the same by the temporal laws of England: so in causes ecclesiastical and spiritual, as namely, *blasphemy*, apostasy from Christianity, heresies, schisms \* \* \* and others, the same are to be determined and decided by ecclesiastical Judges, according to the King's ecclesiastical laws of this realm \* \* \*" Caudrey's case (1590) (emphasis added) 5 Coke at 8b, 9a. See also Coke, Inst. IV, 321.

*Taylor's Case*, 3 Keb. 607. This case involved John Taylor, a religious maniac, charged with having publicly uttered violently anti-religious remarks. The judgment of the Court, announced by Chief Justice Hale, is especially illuminating:

"And Hale said, that such kind of wicked blasphemous words were not only an offense to God and Religion, but a crime against the Laws, State and Government, and therefore punishable in this Court. For to say Religion is a Cheat is to absolve all those obligations whereby civil societies are preserved, and that Christianity is a parcel of the laws of England; and therefore to reproach the Christian Religion is to speak in subversion of the law." 3 Keb. 607; 1 Vent. 293.

The Court's opinion clearly discloses that the sole reason for secular judicial intervention was the desire to protect and sustain an established Church as a part of the apparatus of government. "The one point which appears clearly on reading the available material is that Taylor's words were regarded as an attack upon the state." Nokes, *op. cit. supra*, at 53. Hale, speaking for the King's Bench, considered an attack upon Christianity to be an attack upon the State because "Christianity is a parcel of the laws of England."

The political context which evoked this decision and the comparable decision in *Atwood's Case*\* is summed up by

\* *Atwood's Case*, Cro. Jac. 421 (ed. of 1638) presented the first prosecution at common law for the expression of offensively religious opinion to be considered by the Court of the King's Bench. Nicholas Atwood in 1617 was charged with having uttered scandalous and irreligious words and also with holding heretical opinion. The decision of the King's Bench affirming Atwood's conviction was predicated upon the finding that his words constituted "Seditious parolls \* \* \* encontre le piece de Relme." From the opinion of the Court, it is evident that Atwood was imprisoned only because the Anglican

Professor Holdsworth in his definitive treatise on the history of English law:

"During the Tudor period, as in the medieval period, Church and State were regarded from many points of view as a single society which had many common objects, and the two members of that single society were still regarded as bound to give one another assistance in carrying out those common objects. The Church must help the State to maintain its authority and the State must help the Church to punish nonconformists and infidels. The Church was the Church of the State, and membership of it was therefore a condition precedent for full rights in the State. The King was the supreme head of both Church and State, and the law of the Church was the King's ecclesiastical law." Holdsworth, *History of English Law*, Vol. VIII, 403.

Common law emphasis upon the regulation of blasphemy as ancillary to the establishment of religion has persisted even to relatively recent cases. English courts have been forthright in describing blasphemy as a desecration or a showing of disrespect for that sectarian view which is sanctioned by the State and is integrated into the structure of government. *Reg. v. Petcherini* (1856) 7 Cox, C. C. (Eng.) 79; *Cowain v. Milbourn* (1867) 1 Ex. R. 2 Exch. (Eng.) 230. The blasphemy statutes were part of a legal system which at that time consistently deprived Jews and other non-conformists of their civil rights. *Regina v. Ramsdy and Foote*, 15 Cox, C. C. (Eng.) 231 (1883). Inevitably these cases culminated in opinions explicitly

---

Church enjoyed official status and protection. Implicit in his remarks were, first, an attack upon the King in his capacity as head of the established religion and, second, an attack upon the entire fabric of law providing for the incorporation of the church into the government. \* \* \* Nokes, *op. cit. supra*, at 25. This was the sole rationale of the Court's opinion. Had there been no consolidation of church and state Atwood would not have been convicted.

reserving the protection afforded by the blasphemy laws exclusively to those doctrinal views which enjoy State endorsement. Thus, in *Gathercole's* case in 1838 (2 Lewin, C. C. (Eng.), 237), Baron Alderson declared:

"A person may, without being liable to prosecution for it, attack Judaism, or Mohammedism, or even any sect of the Christian religion (save the established religion of the country); and the only reason why the latter is in a different situation from the others is because it is the form established by law, and is therefore a part of the constitution of the country. In like manner, and for the same reason, any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country."

Clearly, the whole thrust and intent of the concept of blasphemy was to serve as handmaiden to a religious establishment. For a detailed history of its development see Schroeder, *Constitutional Free Speech Defined and Defended* (1919).

As we show later (*infra* pp. 55-60) Section 122 cannot be defended as an exercise of the state police power. Lacking such justification we must assume that the function of Section 122 is the same as that of the early common law blasphemy decisions—to insure the preferential status of favored religions. In this country, however, such an establishment is expressly barred by the basic law. "We have staked the very existence of our country on the faith that complete separation between state and religion is best for the state and best for religion." *Everson v. Board of Education*, *supra*, 330 U. S. at 59. The very factor which made blasphemy prosecution appropriate, even inevitable, at common law—namely, its usefulness in aiding an establishment of religion—brings it into fundamental collision with American constitutional principle.

(2) ***Prohibitions against blasphemy in the United States are inconsonant with First and Fourteenth Amendments.***

Early American decisions rendered before the 14th Amendment was held to make the First Amendment applicable to the states generally upheld the crime of blasphemy as a carry-over from the common law. *Updegrah v. The Commonwealth, supra; Commonwealth v. Kneeland, supra; People v. Ruggles, supra.* In some cases it was additionally required that the statement tend toward a breach of the peace. *State v. Chandler, 2 Harr. (Del.) 553 (1838).*

The leading decision in the United States passing upon the constitutionality of state punishment of blasphemy was handed down by Chancellor Kent in *People v. Ruggles, supra.* He held (8 Johns. at 293):

"The reviling is still an offense because it tends to corrupt the morals of the people, and to destroy good order \* \* \*. The people of this State, in common with the people of this country, profess the general doctrines of Christianity \* \* \* and to scandalize the author of these doctrines is not only in a religious point of view, extremely impious, but even in respect of the obligations due to society, in gross violation of decency and good order \* \* \*. Though the constitution has disregarded religious establishments, it does not forbid judicial cognizance of those offenses against religion and morality, which have no reference to any such establishment \* \* \*. This constitutional declaration, noble and magnanimous as it is, never meant to withdraw religion in general and with it the best sanctions of moral and social obligations from all consideration and notice of the law \* \* \*."

Thus, although Chancellor Kent spoke of "judicial cognizance of \* \* \* offenses against religion and morality

which have no reference to \*\*\* establishment," he also indicated that the protection afforded by blasphemy laws was primarily intended for Christianity as the prevailing national religion, professed by the people of the country. In a subsequent portion of his opinion, he made it even more clear that he was preferring one religion over others (8 Johns. at 295):

"The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussion on any religious subject, is granted and secured; but to revile with malicious and blasphemous contempt the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of *Mahomet* or of the *Grand Lama*, and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity and not upon the doctrines or worship of those imposters."

The First Amendment, however, was drawn precisely to avoid characterizations of this kind by any agency of government. Preferential consideration of any sect by any court is "establishment" within the meaning of the First Amendment. As this Court has held:

"The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to

answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock v. Pennsylvania*, 319 U. S. 105, 63 S. Ct. 870, 891, 87 L. Ed. 1292, 146 A.L.R. 81. As stated in *Davis v. Beason*, 133 U. S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637.

'With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with,' See *Prince v. Massachusetts*, 321 U. S. 158, 64 S. Ct. 488." *United States v. Ballard*, 322 U. S. 78 (1943) at page 87.

We submit that the *Ruggles* case was decided on the basis of principles completely at variance with those applied by this Court in the *Everson*, *McCollum*, and *Ballard* cases. The Fourteenth Amendment had not been adopted and the New York Constitution of 1777, then in effect, contained no express guarantee of freedom of speech or press.\* Even prior to the application of the

---

\* Moreover, Kent himself was entirely hostile toward freedom of expression. This is reflected in his remarks in *People v. Croswell*, 3 Johns. 337, in which he sharply criticized the Virginia resolution on tolerance adopted in 1800 by the legislature of that state: "Against such an injury upon the freedom of American press I beg leave to enter my protest. The founders of our government were too wise and too just ever to have intended, by the freedom of the press, the

First Amendment to the States at least one court recognized the inaccuracies of the *Ruggles* opinion. In July, 1894, the grand jury of Lexington, Ky., handed down an indictment on a charge of blasphemy. The *Ruggles* decision was relied upon by the prosecution without success. Judge Parker sustained the demurrer to the complaint and explicitly rejected Kent's views:

"The leading case in this country in which the crime of blasphemy was discussed was that of the *People v. Ruggles* [8 John 290; s. c. 5 Am. Dec. 335] decided by the Supreme Court of New York in 1810, Chief Justice Kent delivering the opinion

"Whilst this opinion did not declare that Christianity was part of the law of the State of New York, but expressly disclaimed that there was an established religion in that state; yet the closeness with which it adhered to the definition of blasphemy as laid down by Blackstone, and the great reliance placed upon the English decisions, make us hesitate to walk in the path trod by Chief Justice Kent himself. For in England there was an established church.

"In this country, where the divorce between church and state is complete and final, we should examine with care and accept with caution any law framed and intended for a country where church and state are one. The difficulties in reconciling religious freedom with the right to punish for an offense against any given religion are manifest. From the opinion given in *The People v. Ruggles*, we may deduce as conclusions of the court that the people

---

right to circulate falsehood as well as truth \* \* \*." As a delegate to the New York Constitutional Convention in 1831, Chancellor Kent was one of nine who voted against passage of the free speech clause which was adopted by an overwhelming vote. Journal of the New York Constitutional Convention 275-277.

generally in this country are Christians; that Christianity is engrafted upon the morality of the country; \* \* \* that to revile the Christian religion is an offense, but that to revile other religions is not an offense punishable by law \* \* \*

"Under this Constitution no form of religion can claim to be under the special guardianship of the law. The common law of England, whence our law of blasphemy is derived, did have a certain religion under its guardianship, and this religion was part of the law. \* \* \* The essence of the law against blasphemy was that the offense, like apostasy and heresy, was against religion, and it was to uphold the established church, and not in any sense to maintain good order \* \* \*

"Blasphemy is a crime growing from the same parent stem as apostasy and heresy. It is one of a class of offenses designed for the same general purpose, the fostering and protecting of a religion accepted by the state as the true religion, whose precepts and tenets it was thought all good subjects should observe. In the code of laws of a country enjoying absolute religious freedom there is no place for the common law crime of blasphemy." (Although not officially reported this opinion is reprinted in the *Truth Seeker's Annual* for 1895, see Schroeder, *Constitutional Free Speech Defined and Defended* (1919), at page 60.)

Recent decisions by this Court plainly call for a re-evaluation at this time of the *Ruggles* and other earlier decisions. Certainly, to whatever extent they relied on the fact that the state is empowered to protect the faith of a majority of its citizens, they are no longer law. We submit that upon such a re-evaluation, it must be held that Section 122 violates the standards laid down in the *Everson* and *McCollum* decisions in that it penalizes "professing

religious beliefs or disbelief(s)" and is a law which "aid(s) one religion, aid(s) all religions, or prefer(s) one religion over another".

**(3) *Blasphemy laws require active intervention by the state in religious affairs.***

One of the underlying reasons for the adoption of the First Amendment was the fact that any intervention by the State in religious affairs would require it to establish standards as to what was and was not permissible. Thus Madison objected to the Virginia Bill Establishing a Provision for Teachers of the Christian Religion:

"Because the bill implies, either that the civil magistrate is a competent judge of religious truths—or that he may employ religion as an engine of civil policy. The first is an arrogant pretension, falsified by the contradictory opinions of rulers in all ages, and throughout the world . . . ." (Cited in Blau, *op. cit., supra.* p. 115.)

The validity of this view is amply shown here. Since the State has undertaken to suppress pictures because they are sacrilegious or blasphemous, it is required to establish standards by which the picture may be measured. Yet it has failed to do so and that failure was inevitable. Such standards could not be established without violating the First Amendment's injunction against official intervention in religious affairs. In responding to this argument the Court of Appeals held that it is not "true that the Regents must form religious judgments . . . religion [is to be construed] as that word is understood by the ordinary, reasonable person . . . ." (R. 154). Nevertheless, expert testimony of religious groups was, in fact, accepted and considered by the Board of Regents (R. 10, 94). Indeed, were such testimony to have been excluded it

'might well have amounted to an abuse of discretion as an exclusion of the most competent testimony on matters of sacrilege. Section 122 inescapably forces state agencies into an illegal intrusion into religious question.

Theology was placed by the First Amendment beyond the ken and purview of a secular government. To permit now the publication or showing only of such artistic works of entertainment as successfully pass a state-defined test of religious propriety is not only to enervate our intellectual life and compel the artist to choose between integrity and the right of access to public attention, but, even more dangerous, to embroil government in bitter and unending religious strife. Laws penalizing "sacrilege" violate the express statement of this Court that "the Constitution does not define religion". *Taylor v. U. S.*, 98 U. S. 145.

### POINT III

#### **Section 122 of the Education Law cannot be justified as a proper exercise of the State Police Power.**

The courts below have attempted to justify Section 122 not as an aid to religion but as a necessary means for the preservation of community order and public peace. It is pertinent to inquire, therefore, in what way the banning of "The Miracle" was in fact related to the preservation of public peace and order. It does not appear from any of the facts in the record that its exhibition would have created an explosive or dangerously tense community situation.\*

---

\* The American Civil Liberties Union, vigorously opposed to any form of religious intolerance or persecution, has noticed that a wave of anti-Catholicism appeared in New York *after* spokesmen for the Catholic Church sought to suppress "The Miracle." It discerned no

Prior to action by public officials, exhibition of "The Miracle" produced no hint whatever of public unrest. There was not the slightest breach of decorum on the part of the audience during any of its showings. Even those who are most energetic in urging its suppression have urged only that the film is offensive on doctrinal grounds and have nowhere alleged that there existed any danger of physical violence, rioting or public commotion. Nothing in the tenor or mood of the picture could possibly be conceived as inciting active hostility to any religious groups on the part of the audience.

---

anti-Catholicism after "The Miracle" began to play but before any attempts were made to suppress it. We quote here, with permission of COMMONWEAL, a lay Catholic magazine, an exchange of correspondence between its editor and one of the authors of this brief:

March 20, 1951, Herbert Monte Levy, Esq. to COMMONWEAL. "Congratulations for your excellent stand in your editorial of March 2nd against censorship of the film, THE MIRACLE.

"It is encouraging to see that a Catholic publication of your reputation recognizes that a growth of anti-Catholic feeling is one tragic result of the present situation. This is not a strange thing; it happens when any minority group attempts to suppress material unfavorable to it. \* \* \* As a human being, I have been concerned with the encouragement given anti-Catholicism caused by the suppression of THE MIRACLE. Whatever benefit a group may temporarily gain from suppression is completely outweighed by the accelerated schisms created among the public at large. It seems to me that in addition to the fundamental civil liberties arguments against suppression of films, it is within the group's self interest not to engage in activities that engender suppression."

April 11, 1951, John Cogley, Editor, COMMONWEAL, to Herbert Monte Levy, Esq. "Thank you for your recent letter on our 'Miracle' stand. It is encouraging to us to have your support on this question. Of course, as is obvious from what has appeared in our columns, we agree with what you have to say on the question. Both letters are on file at the office of the American Civil Liberties Union, 170 Fifth Avenue, New York, N. Y.

It may be conceded that some persons were deeply offended by the public exhibition of the film but this fact alone cannot serve to silence its sound track. The argument that "sacrilegious" or blasphemous expressions must be outlawed to prevent rioting by those who might feel themselves offended is exceedingly dangerous. This argument could be invoked to justify suppression of any beliefs whenever a dominant majority became sufficiently vociferous to threaten violence to minority creeds. Clearly this is not the intent of the First Amendment. Liberty of religious expression, like liberty of political expression, may not be made contingent upon the sufferance of the majority.

The right to entertain and to voice religious beliefs is a right attaching to the individual conscience, which may not be lightly impaired. For the state to suppress criticism of the viewpoint of any sect, no matter how widespread, because the adherents of that sect threaten violence against their critics is for the state to permit itself to be bludgeoned into the very establishment of religion which the First Amendment forbids.

This Court has been appreciative of the dangers inherent in the suppression of speech as a means of appeasing the threat of violence:

"Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-conceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire*, supra, 315 U. S. at pages 571-572, 62 S.

Ct. at page 769, 86 L. Ed. 1031, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See *Bridges v. California*, 314 U. S. 252, 262; 62 S. Ct. 190, 193, 86 L. Ed. 192, 159 A.L.R. 1346; *Craig v. Harney*, 331 U. S. 367, 373, 67 S. Ct. 1249, 1252, 91 L. Ed. 1546. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v. City of Chicago*, 337 U. S. 1, 4-5 (1949).

So long as sacrilegious material is peacefully disseminated the fact that some people opposed to it might cause a disturbance affords no ground for preventing its circulation. *Lynch v. City of Muskogee*, 47 F. Supp. 592 (D. C. Okla. 1942); *Oney v. Oklahoma City*, 120 F. (2d) 861 (C. C. A. 10th, 1941).

The only ground for limiting speech is the existence of a clear and present danger of a substantial evil that the legislature have the right to prevent. There was no evidence in regard to the existence of a danger to the public present here; the statute is not couched in such terms; there was no such finding. The Court below declared merely that:

"Insult, mockery, contempt and ridicule can be a deadly form of persecution—often far more so than more direct forms of action. The prohibition of such conduct comes within the legitimate sphere of State action \* \* \*." (R. 155)

But the fact that intemperate attacks can be a deadly form of persecution is not a substitute for a finding of clear and

present danger which exists and is not merely a potential possibility. Even under the recent test of the gravity of the evil discounted by its improbability (*Dennis v. United States*, 340 U. S. 887 (1950)) the evil is not grave—the only evil is that some may cease to believe in a religious dogma; if this be evil, it is certainly not an evil that the legislature has a right to prevent. The evil that persons possessing certain beliefs will be physically persecuted because of attacks upon the beliefs is so remote as to be non-recognizable. If it be recognizable, then *all* attacks upon *all* beliefs may be prohibited. This is the essence of what the First Amendment was designed to prevent.

We do not mean by this to say that New York is without power to prevent the showing of films which do in fact provoke public disorder. Sections 720 and 722 of the Penal Law of New York are quite sufficient for this purpose,\* and they achieve their objectives without necessarily forcing the State into religious controversies in which they have no special competency and constitutionally are required to have no special interest.

\* Section 720 of the Penal Law of New York provides:

"Any person who shall by any offense or disorderly act or language, annoy or interfere with any person in any place or with the passengers of any public stage, railroad car, ferry boat, or other public conveyance, or who shall disturb or offend the occupants of such stage, car, boat or conveyance, by any disorderly act, language or display, although such act, conduct, or display may not amount to an assault or battery shall be deemed guilty of a misdemeanor."

Section 722 of the Penal Law of New York provides:

"Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
- \* \* \*
4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;
- \* \* \*

## POINT IV

**Section 122 of the Education Law is vague, indefinite and ambiguous. It is void for failing to conform to the requirement of due process of law as prescribed by the Fourteenth Amendment.**

The legislature has made no attempt to establish a standard under Section 122 of the Education law which is sufficiently definite to support its action. It has used a single word, "sacrilegious." To invoke the statute meaningfully the word must be given some precise meaning which in no way has been defined. We submit, therefore, that Section 122 is void for vagueness. Any statute must be void as a violation of the due process of law prescribed by the Fourteenth Amendment to the United States Constitution when it is so vague that men of common intelligence must necessarily guess at its meaning. *Connally v. General Construction Company*, 269 U. S. 385, 391; *U. S. v. Cohen Grocery Company*, 255 U. S. 81; *U. S. v. Capital Traction Company*, 34 App. D. C. 592. It must convey a "Sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices," or it will fall. *Jordan v. DeGeorge*, 341 U. S. 223 (1951). These requirements apply with equal stringency to licensing statutes, *Kunz v. New York*, *supra*.

No hint is given by the legislature in the statute or by the Board of Regents in any regulations as to what constitutes sacrilege.\* The opinion of the Appellate Division

---

\*Even prior decisions of the state censors upon other motion pictures would be valueless since, according to the Director of the Motion Picture Division of New York State Education Department " \* \* \* it is a matter of \* \* \* policy that no action taken in regard to a specific motion picture should be released by the Motion Picture Division." Letter of Hugh M. Flick to Arthur D. Goldstein, Feb. 28, 1952 in ACLU files.

adopted by the Court of Appeals clearly reveals the indefiniteness of the statutory standard. The Appellate Division held that because of varying views of religious experts on this question, "the issue is one of judgment to be resolved by the administrative body . . . . . (R. 94). By adopting this decision the Court of Appeals thus takes the position that when the standard is so vague that experts disagree, the only criterion to be employed is the "judgment" of the administrative body. Constitutional rights, however, cannot be restricted by the mere unfettered *ad hoc* judgment of administrative agencies without providing any clear-cut standard to assist in their adjudication. Surely neither administrative agencies nor courts are equipped to grapple with complex religious questions. Still less should the creators of the film be compelled to guide its production by fears of reprisal if their attempt to treat a religious theme be arbitrarily found evil in the eyes of the censor.

The Court below by its reliance upon a dictionary definition to establish the unambiguity of the word "sacrilegious" illustrates instead its vagueness. The Court declared:

"Only the word 'sacrilegious' is attacked for indefiniteness. *The dictionary, however, furnishes a clear definition thereof, were it necessary to seek one, as e. g., 'the act of violating or profaning anything sacred'* (Funk & Wagnall's New Standard Dictionary, 1937). *There is no difficulty in recognizing the limits of the criterion thus established, and the courts have had no problem either with the word 'sacrilegious' or with its synonym, 'profane.'*" (Emphasis supplied.) (R. 151)

It is in order to note that the reason the courts "have had no problem" with the word "sacrilegious" is that,

prior to this case, they have never, so far as we have been able to determine, been called upon to construe it. Nor have the New York courts, so far as we have been able to ascertain, ever construed the word "profane."\*\*

Assuredly, the definition of "sacrilege" offered by the Court of Appeals is no more definite than the statutory ban on any publication "devoted to the publication, and principally made up of criminal news, police reports or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime; \* \* \*" struck down by this

---

\* Precedents in other jurisdictions defining the term "profane" demonstrate that its meaning bears little if indeed any resemblance to the definition of "sacrilege" laid down below.

The common law offense of profanity, or profane swearing consisted of a number of essential elements, and some which were usually, though not always, essential to the criminal offense. It was essential that the swearing constitute a public nuisance (a concept which, if introduced into the area of speech not involving "fighting words," might result in the suppression of all unpopular speech, which always is a nuisance to the public, but protected by the First Amendment). *State v. Pepper*, 68 N.C. 243, 12 Am. R. 637 (1872). In order for the swearing to be a public nuisance, it had to be uttered in the presence and hearing of several persons (*State v. Pepper, supra*; *Bodenhamer v. State*, 60 Ark. 10, 28 S.W. 507; *Gaines v. State*, 7 Lea (Tenn.) 410 (1881)), in a public place (*State v. Shanks*, 88 Miss. 410; *Republic v. Ben*, 10 Hawaii 278 (1896)), and loudly and boisterously enough to annoy the hearers. *Commonwealth v. Brown*, 67 Pa. Dist. & Co. 151 (1948); *Commonwealth v. Linn*, 158 Pa. 22 (1893). It was usually necessary for the oaths which constitute the offense to be repeated (*Geree v. State*, 71 Ala. 7 (1881); *Gaines v. State, supra*) although this is not always so if the words used, or the tone or manner or circumstances are such as to make the words a public nuisance, *Young v. State*, 10 Lea (Tenn.) 165 (1882). The requirements as to what constitutes "profane" within the meaning of profane swearing varies, but generally, it is required that the words must contain an imprecation of divine vengeance (*Thompson v. State*, 34 A.I. App. 608; *Town of Torrington v. Taylor*, 137 P. 2d 621 (Wyo. 1943)), divine imprecation (*Duncan v. U. S.*, 48 Fed. 128 (CCA Ore.) (1933), cert. denied, 283 U. S. 863), irreverence toward God or holy things, *Town of Torrington v. Taylor, supra*, or disrespect or contempt for God's name. *Duncan v. U. S. supra*.

Court in *Winters v. New York*, 333 U. S. 507 (1947). And certainly Section 122 as interpreted provides no more definite standards than those struck down by this Court in *Kunz, supra*, which made it unlawful publicly to "ridicule or denounce any forms of religious belief, service or reverence, or to preach or expound atheism or agnosticism, or render any pretense therefore . . . ." If anything, the law invalidated in *Kunz* would seem to have been an elucidation of what the legislature means here by "sacrilege". The words at issue in *Kunz* are almost identical with those used by the Court of Appeals below in attempting to render definite the word "sacrilege." Surely, therefore, the vague word "sacrilegious" must fall; neither a court nor the administrative official themselves could here create more definite standards any more than they could in *Kunz*. Indeed, the Court of Appeals below created far more indefinite criteria. The Court approved the suppression of films which are contemptuous of religion "to the extent that it has been here." (R. 154) The addition of these words utterly deprives the standards set out by the Court of any precision or clarity.

Action taken on the basis of a statute so vague both in form and as interpreted is without question void for failing to provide due process of law.

64

## CONCLUSION

**The judgment of the Court below should be reversed.**

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,  
*Amicus Curiae,*

MORRIS L. ERNST,  
H. WILLIAM FITELSON,  
OSMOND K. FRAENKEL,  
ARTHUR GARFIELD HAYS,  
HERBERT MONTE LEVY,  
EMANUEL REDFIELD,  
*Counsel.*

NEWELL G. ALFORD, JR.,  
ROBERT MARKEWICH,  
ELMER RICE,  
of the New York Bar,

EBERHARD P. DEUTSCH,  
of the Louisiana Bar,

WILLIAM V. GEORGE,  
AUSTIN T. WALDEN,  
of the Georgia Bar,

*of Counsel.*

AMERICAN JEWISH CONGRESS,  
*Amicus Curiae,*

HERMAN L. WEISMAN,  
SHAD POLIER,  
WILL MASLOW,  
LEO PFEFFER,  
PHILIP BAUM,

*Counsel.*

The Metropolitan Committee for Religious Liberty is the New York Chapter of Protestants and Other Americans United for the Separation of Church and State whose main objective is the support of the constitutional principle of separation of church and state. The said Committee supports the views set forth in the brief above.

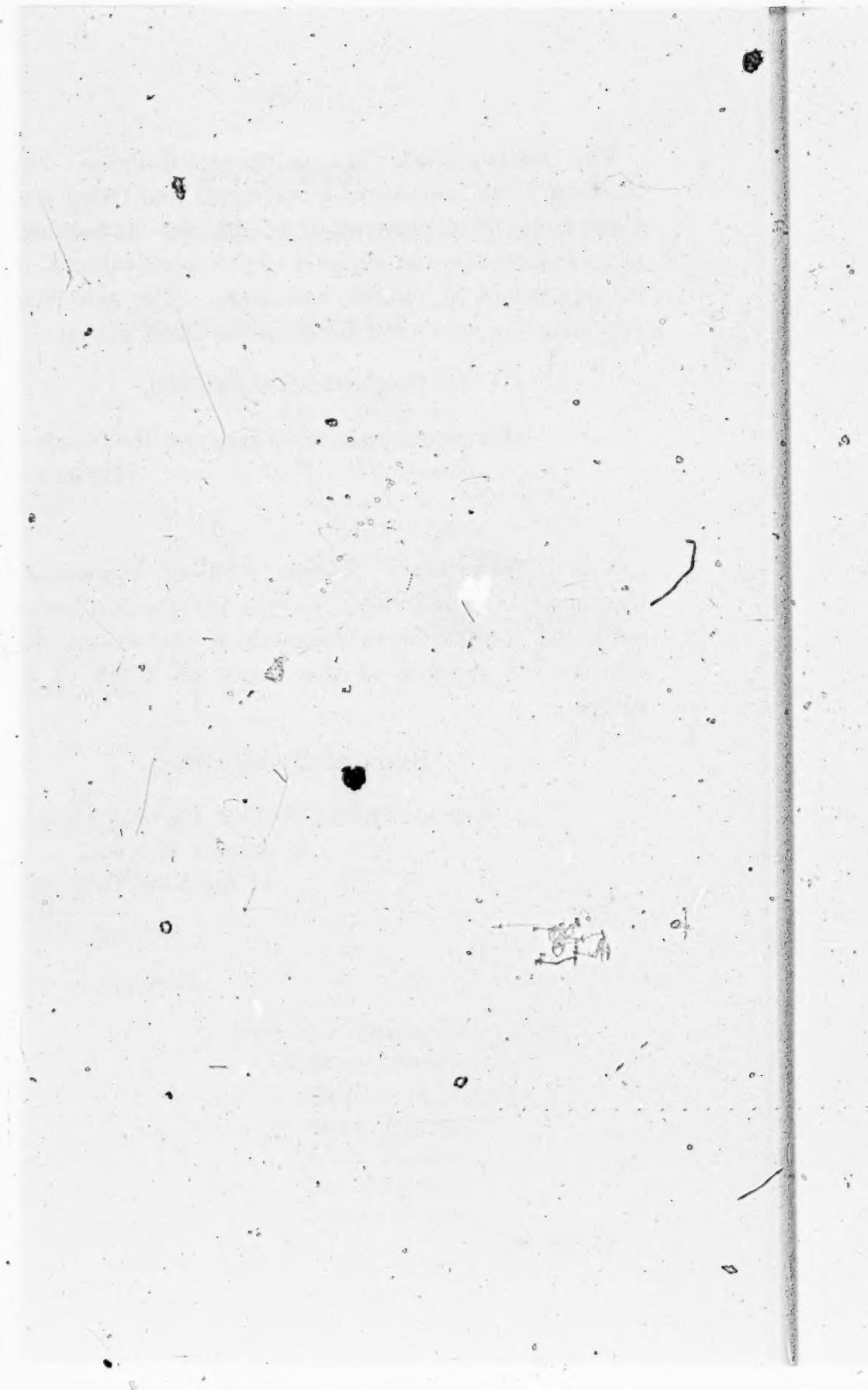
Respectfully submitted,

METROPOLITAN COMMITTEE FOR RELIGIOUS LIBERTY,  
HERMAN SEID,  
*Of Counsel.*

The International Motion Picture Organization, an organization of individual motion picture producers, whose principal interest is in freedom of the screen, desires to express its support of the views set forth in the brief above.

Respectfully submitted,

INTERNATIONAL MOTION PICTURE ORGANIZATION,  
A. JOSEPH HANDEL,  
of the New York Bar,  
*of Counsel.*



## APPENDIX I

### The Academy Awards

The Award winning picture is listed first. Then the Award winning actress, actor and director.

- 1928. *Wing and Sunrise* (shared). Janet Gaynor, *Seventh Heaven*; Emil Jannings. *The Way of All Flesh*. Frank Borzage, *Seventh Heaven*.
- 1929. *The Broadway Melody*. Mary Pickford, *Coquette*; Warner Baxter, *In Old Arizona*. Frank Lloyd, *Divine Lady*.
- 1930. *All Quiet on the Western Front*. Norma Shearer, *The Divorcee*; George Arliss, *Disraeli*. Lewis Milestone, *All Quiet on the Western Front*.
- 1931. *Cimarron*. Marie Dressler, *Min and Bill*; Lionel Barrymore, *A Free Soul*. Norman Taurog, *Skippy*.
- 1932. *Grand Hotel*. Helen Hayes, *The Sin of Madelon Claudet*; Frederic March, *Dr. Jekyll and Mr. Hyde*. Frank Borzage, *Bad Girl*.
- 1933. *Cavalcade*. Katharine Hepburn, *Morning Glory*; Charles Laughton, *Henry VIII*. Frank Lloyd, *Cavalcade*.
- 1934. *It Happened One Night*. Claudette Colbert and Clark Gable and Director Frank Capra, all for *It Happened One Night*.
- 1935. *Mutiny on the Bounty*. Bette Davis, *Dangerous*; Victor McLaglen, *The Informer*. John Ford, *The Informer*.
- 1936. *The Great Ziegfeld*. Luise Rainer, *The Great Ziegfeld*; Paul Muni, *The Story of Louis Pasteur*. Frank Capra, *Mr. Deeds Goes to Town*.

1937. *The Life of Emile Zola.* Luise Rainer, *The Good Earth*; Spencer Tracy, *Captains Courageous*. Leo McCarey, *The Awful Truth*.
1938. *You Can't Take It with You.* Bette Davis, *Jezebel*; Spencer Tracy, *Boys' Town*. Frank Capra, *You Can't Take It with You*.
1939. *Gone with the Wind.* Vivien Leigh, *Gone with the Wind*; Robert Donat, *Goodbye, Mr. Chips*; Victor Fleming, *Gone with the Wind*.
1940. *Rebecca.* Ginger Rogers, *Kitty Foyle*; James Stewart, *The Philadelphia Story*. John Ford, *The Grapes of Wrath*.
1941. *How Green Was My Valley.* Joan Fontaine, *Suspicion*; Gary Cooper, *Sergeant York*. John Ford, *How Green Was My Valley*.
1942. *Mrs. Miniver.* Greer Garson, *Mrs. Miniver*; James Cagney, *Yankee Doodle Dandy*. William Wyler, *Mrs. Miniver*.
1943. *Casablanca.* Jennifer Jones, *The Song of Bernadette*; Paul Lukas, *Watch on the Rhine*. Michael Curtiz, *Casablanca*.
1944. *Going My Way.* Ingrid Bergman, *Gaslight*; Bing Crosby, and Director Leo McCarey, for *Going My Way*.
1945. *The Lost Weekend.* Joan Crawford; *Mildred Pierce*; Ray Milland, and Director Billy Wilder, for *The Lost Weekend*.
1946. *The Best Years of Our Lives.* Olivia De Haviland, *To Each His Own*; Frederic March and Director William Wyler for *The Best Years of Our Lives*.
1947. *Gentlemen's Agreement.* Loretta Young, *The Farmer's Daughter*; Ronald Colman, *A Double Life*. Elia Kazan, *Gentlemen's Agreement*.

1948. *Hamlet*. Jane Wyman, *Johnny Belinda*; Laurence Olivier, *Hamlet*. John Huston, *The Treasure of the Sierra Madre*.
1949. *All the King's Men*. Olivia De Haviland, *The Heiress*; Broderick Crawford, *All the King's Men*. Joseph L. Mankiewicz, *A Letter to Three Wives*.
1950. *All About Eve*. Judy Holliday, *Born Yesterday*; Jose Ferrer, *Cyrano de Bergerac*, Joseph L. Mankiewicz, *All About Eve*.

(The above is republished from page 73 of the February 1952 issue of *Films in Review*.)

## APPENDIX II

**Motion Pictures Playing in the Borough of Manhattan,  
New York City, the week of Feb. 23, 1952, as Reported  
in CUE (Feb. 23, 1952 issue).**

Note: Quotations below, unless otherwise indicated, are from CUE's Feb. 23, 1952 issue. Comments in parentheses are those of the authors of this brief.

**A. Motion pictures with social, historical or informational significance.**

1. **AFRICAN QUEEN, THE.** "Superb Technicolor jungle, river, wild animal photography."
2. **BAD BOY.** ". . . drama of reformation of a delinquent. Set on Variety Club's Texas ranch . . ."
3. **BATTLEGROUND.** "Stirring, realistic drama based on incident in crucial Battle of Bastogne, World War II."
4. **BONNIE PRINCE CHARLIE.** ". . . based on Young Pretender's battle for British throne. 1745."
5. **BROKEN ARROW.** ". . . war and peace in Apache Indian country, 1870's. Authentic background, costumes, native customs, tribal dances, music, etc. . . ."
6. **CALL ME MISTER.** "They put on an Army Show." (Note: In its original stage version, this show was recognized as a satirical take-off on Army life. Query as to the effect of censorship on changing it to a "typical . . . musical".)
7. **CHRISTOPHER COLUMBUS.** ". . . Columbus's discovery of New World."
8. **COME FILL THE CUP.** ". . . drama with alcoholic twist."
9. **CRY, THE BELOVED COUNTRY.** (A study of South Africa's racial problems.)

10. DEATH OF A SALESMAN. (Invoives the financial problems of a salesman in our times.)
11. DECISION BEFORE DAWN. (Involves the psychological problems of treason.)
12. DESTINATION TOKYO. "Stirring drama of U. S. submarine service in Japanese waters. Authentically reconstructed story . . ."
13. DETECTIVE STORY. (Involves the problem of police brutality.)
14. EDGE OF THE WORLD. ". . . dramatization of life in the Hebrides Islands . . ."
15. FIVE FINGERS. "Astonishing and thrilling spy melodrama; . . . True Story . . ."
16. GOLDEN TWENTIES, THE. "Prepared by March of Time. Fascinating compilation of newsreels of 1920's."
17. GUNFIGHTER, THE. "Absorbing, superbly acted psychological drama. The brief and sudden death of a man who lived and died by the gun."
18. HALLS OF MONTEZUMA. "Gripping drama of Marine Corps landing in Pacific, World War II. Filmed . . . with cooperation Armed Forces . . . shatteringly realistic . . ."
19. HURRICANE ISLAND. "Pretty wild version of how Ponce de Leon discovered Fountain of Youth . . ."
20. IN OLD CHICAGO. "Thrilling drama of . . . Chicago Fire."
21. IVAN THE TERRIBLE. "Drama of Russia's 16th Century czar."
22. JOAN OF ARC. ". . . drama of France's 15th century girl savior and saint . . ."
23. JOURNEY INTO LIGHT. "Sentimental sob story about a preacher . . ."

24. KNOCK ON ANY DOOR. ". . . drama of a juvenile delinquent and the steps in his criminal career . . ."
25. LOWER DEPTHS. ". . . a powerful social document."
26. MAGIC FACE, THE. "Astonishing mixture of absurdity and seeming truth . . . story of German actor who murders and impersonates Hitler . . . careful detail 'realism' . . ."
27. MEDIUM, THE. ". . . about a swindling seeress . . ."
28. MIRACLE IN MILAN. ". . . social satire in comic fantasy form . . ."
29. NAVAJO. ". . . social documentary . . ."
30. NINOTCHKA. "Screamingly funny satirical farce comedy, with Soviet Russia the butt."
31. PASSION FOR LIFE. "Interesting true story recreation of educational problems . . ."
32. QUO VADIS. ". . . about Christian martyrs in mad Emperor Nero's Rome . . . filled with . . . religious fervor . . ."
33. RED BADGE OF COURAGE. "Brilliant and unforgettable drama of a youth who grows into manhood during two days of battle in the Civil War."
34. RETREAT, HELL! "Excellent military 'documentary style' reenactment U. S. Marine training, landing in Korea, fighting and famous 'strategic withdrawal' of December 1950. Authentic, grim, rounded out with combat film taken at the time."
35. RIVER, THE. ". . . picturesque native customs, ceremonies, life on Ganges . . ."
36. ROYAL SCANDAL, A. ". . . satire on Catherine of Russia and her amours."
37. SWORD IN THE DESERT. "Exciting drama of civil war in Holy Land, between Jewish resistance and British occupation forces."

38. TANKS ARE COMING, THE. ". . . packed with excellent military melodramatics . . ."
39. THAT HAMILTON WOMAN. ". . . drama of Lord Nelson and his love for Lady Hamilton."
40. THREE CAME HOME. "Absorbing documentary style drama; based on factual story of an American woman's internment in Japanese prison camp."
41. TOMORROW THE WORLD. "Excellent drama based on Broadway play about a Nazi boy in an American home."
42. VIVA ZAPATA. "Large-scale drama of Mexican-revolutionist patriot-hero of 1910, his life and death. Episodic and superficial in its military and political significance (note: other critics disagree); but well-acted, vivid picture of Mexican peon-life."

**B. The other pictures listed in the said issue of CUE, and not classified in the category above, are listed below.**

- |                                 |                                     |
|---------------------------------|-------------------------------------|
| 1. AMERICAN IN PARIS, AN        | 21. CROSSWINDS                      |
| 2. ANGEL IN EXILE               | 22. CURTAIN CALL AT<br>CACTUS CREEK |
| 3. ANNE OF THE INDIES           | 23. DAKOTA                          |
| 4. ANNIE GET YOUR GUN           | 24. DARLING, HOW COULD<br>YOU       |
| 5. ASSASSIN FOR HIRE            | 25. DAY IN THE COUNTRY              |
| 6. AWFUL TRUTH, THE             | 26. DESTINATION UNKNOWN             |
| 7. BABES IN ARMS                | 27. DISTANT DRUMS                   |
| 8. BALLERINA                    | 28. DOUBLE DEAL                     |
| 9. BIG CAT                      | 29. DOUBLE DYNAMITE                 |
| 10. BRIDE OF THE GORILLA        | 30. DREAM OF A COSSACK              |
| 11. BROWNING VERSION, THE       | 31. DYNAMITE PASS                   |
| 12. CALLAWAY WENT<br>THATAWAY   | 32. ELOPEMENT                       |
| 13. CALLING BULLDOG<br>DRUMMOND | 33. F.B.I. GIRL                     |
| 14. CAPTAIN BOYCOTT             | 34. FAMILY SECRET                   |
| 15. CAPTAIN FROM CASTILE        | 35. FANCY PANTS                     |
| 16. CAPTIVE OF BILLY<br>THE KID | 36. FATHER OF THE BRIDE             |
| 17. CASA MANANA                 | 37. FLAME OF ARABY                  |
| 18. CASBAH                      | 38. FLAME OF NEW ORLEANS            |
| 19. CLIMAX, THE                 | 39. GALLOPING MAJOR, THE            |
| 20. COBRA STRIKES               | 40. GIRL IN EVERY PORT.             |

41. GIRL ON THE BRIDGE  
 42. GOLDEN GIRL  
 43. GREAT SINNER, THE  
 44. GREATEST SHOW ON EARTH  
 45. HATCHET MAN  
 46. HERE COMES THE GROOM  
 47. HIGHLY DANGEROUS  
 48. HOLD THAT GHOST  
 49. HONEYMOON AHEAD  
 50. HOTEL SAHARA  
 51. I'LL NEVER FORGET YOU  
 52. I'LL SEE YOU IN MY DREAMS  
 53. IN THE NAVY  
 54. JOUR DE FETE  
 55. LADY PAYS OFF  
 56. LADY POSSESSED  
 57. LAVENDER HILL MOB  
 58. LET US LIVE  
 59. LET'S DANCE  
 60. LIFE OF RILEY  
 61. LIGHT TOUCH, THE  
 62. LONE STAR  
 63. LOVE NEST  
 64. LOVERS OF VERONA  
 65. MAGIC GARDEN, THE  
 66. MAN-EATER OF KUMAON  
 67. MAN IN THE DINGHY  
 68. MAN IN THE SADDLE  
 69. MAN OF ARAN  
 70. MAN WITH A CLOAK  
 71. MARIE DU PORT  
 72. MASSACRE HILL  
 73. MEET ME IN ST. LOUIS  
 74. MR. LORD SAYS NO  
 75. MR. SOFT TOUCH  
 76. MODEL & THE MARRIAGE BROKER  
 77. MY FAVORITE SPY  
 78. MY FIRST LOVE  
 79. MY SISTER EILEEN  
 80. NAUGHTY NINETIES  
 81. NIGHT IN PARADISE  
 82. OLIVER TWIST  
 83. ON THE LOOSE  
 84. ON THE TOWN  
 85. PANDORA & THE FLYING DUTCHMAN  
 86. POOL OF LONDON  
 87. PURPLE HEART DIARY  
 88. RASHOMON  
 89. ROCKY MOUNTAIN  
 90. SAILOR BEWARE  
 91. SAVAGE DRUMS  
 92. SITTING PRETTY  
 93. SLAUGHTER TRAIL  
 94. SMALL BACK ROOM  
 95. SNOW WHITE AND 7 DWARFS  
 96. SON OF DR. JEKYLL  
 97. SON OF FRANKENSTEIN  
 98. STRANGE DOOR, THE  
 99. STRANGE WOMAN  
 100. TALES OF HOFFMAN  
 101. TEN TALL MEN  
 102. TEXANS NEVER CRY  
 103. THEY GOT ME COVERED  
 104. THIS WOMAN IS DANGEROUS  
 105. THUNDER ON THE HILL  
 106. TONY DRAWS A HORSE  
 107. TOP O' THE MORNING  
 108. TRAIL OF ROBIN HOOD  
 109. TWO FLAGS WEST  
 110. TWO GALS & A GUY  
 111. UNDER THE OLIVE TREE  
 112. UNKNOWN MAN, THE  
 113. WEST OF THE PECOS  
 114. WEST POINT STORY  
 115. WESTWARD THE WOMEN  
 116. WHEN MY BABY SMILES AT ME  
 117. WHEN THE REDSKINS RODE  
 118. WHEN WORLDS COLLIDE  
 119. WHIPHAND, THE  
 120. WINTER MEETING  
 121. WITHOUT HONOR  
 122. WOMAN IN QUESTION  
 123. YOU WERE NEVER LOVELIER  
 124. YOUR'E IN THE NAVY NOW

**LIBRARY  
SUPREME COURT, U.S.**

Office - Supreme Court, U. S.  
**FILED**

MAR - 8 1952

CHARLES ELMORE COOPLEY  
CLERK

IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1951**

**No. 522**

**JOSEPH BURSTYN, INC.,**

*Appellant,*

**vs.**

**LEWIS A. WILSON, et al.,**

*Appellees.*

**On Appeal from the Court of Appeals of the  
State of New York**

---

**MOTION OF THE COMMITTEE ON CONSTITUTIONAL  
LIBERTIES OF THE NATIONAL LAWYERS GUILD  
FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE**

---

O. JOHN ROGGE,  
*Counsel for the Committee on  
Constitutional Liberties of  
the National Lawyers Guild,  
401 Broadway,  
New York, N. Y.*



IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1951**

---

No. 522

---

JOSEPH BURSTYN, INC.,

Appellant,

vs.

LEWIS A. WILSON, et al.,

Appellees.

---

On Appeal from the Court of Appeals of the  
State of New York

---

**MOTION OF THE COMMITTEE ON CONSTITUTIONAL  
LIBERTIES OF THE NATIONAL LAWYERS GUILD  
FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE**

*To the Honorable, The Chief Justice of the United States  
and the Associate Justices of the Supreme Court of  
the United States:*

The Committee on Constitutional Liberties of the National Lawyers Guild respectfully moves this Court pursuant to Rule 27, paragraph 9, of the Rules of this Court, for leave to file a brief in this case as amicus curiae.

The applicant has sought the consent of the parties herein to the filing of a brief in this case as amicus curiae, but on February 28, 1952, the attorneys for the appellees refused such consent.

The National Lawyers Guild is a bar association composed of attorneys practicing throughout the United States.

As a bar association vitally concerned with maintaining and furthering the underlying tenet of our democratic political ideal, that all persons must be free to communicate and receive information and opinion on all matters of public interest without undue interference or restraint from governmental authority, the National Lawyers Guild, through its Committee on Constitutional Liberties, should like to present its views to assist this Court in arriving at a decision which will reaffirm and strengthen the root principle upon which our nation is founded.

Applicant respectfully requests leave to submit a brief to discuss more fully the following argument which applicant believes material and relevant to the instant case and not presented to the Court by the parties to the cause:

When the United States Senate gave its consent and approval to the *Charter of the United Nations* and the President ratified and deposited this multilateral treaty (59 Stat. 1031-1218), the national government thereby entered into an international commitment to promote and encourage "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion \* \* \*", *United Nations Charter*, Art. 55, Art. 1, Sec. 3.

Today there can no longer be any room for doubt that man's ancient and continuing right to seek an understanding of his relation to the "Laws of Nature and Nature's God" constitutes one of the most basic of all human rights. History reveals repeated instances of the proclamation and establishment of the one and only "true" religion and "true" church with each succeeding proclamation and establishment seeking to suppress and destroy its predecessors and opponents and to brand them and their adherents as false, infidel and sacrilegious. Yet there has remained inviolate man's right to continue his search for further enlightenment in matters of religion, often undertaken in the face of unspeakable ordeals and punishments inflicted by the keepers of the then and there "true" religion or church.

Certainly the framers of the *Charter of the United Nations* intended that treaty to include international recognition of the individual human right to inquire into and evaluate practices and customs held to be sacred by some, and further to include the right freely to broadcast the results of such inquiry.

In recent years the United States has given its official approval to numerous international agreements intended to reaffirm our recognition of these fundamental freedoms and human rights. On January 1, 1942, the United States joined many of our sister nations in signing the *Declaration by United Nations* which expressly included religious freedom among the human rights to be preserved. See: Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations, Commentary and Documents*, World Peace Foundation, Boston, 1949, p. 570. Since the creation of the United Nations Organization our nation has consistently been one of the leaders in the endeavors of the United Nations to spell out in greater detail the nature of these international human rights and fundamental freedoms. See: George C. Marshall, "No Compromise of Essential Freedoms", *Department of State Bulletin*, Oct. 3, 1948, p. 432; Mrs. Franklin D. Roosevelt, "The Struggle for Human Rights", *Department of State Bulletin*, Oct. 10, 1948, p. 460; John M. Cates, Jr., "Expanding Concept of Individual Liberty", *Department of State Bulletin*, Dec. 31, 1951, p. 1058.

The United Nations General Assembly on December 19, 1948, adopted the *Universal Declaration of Human Rights* "as a common standard of achievement for all peoples and all nations". *Department of State Bulletin*, December 19, 1948, p. 752.

This *Universal Declaration* provides:

**ARTICLE 18.** Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public

or private, to manifest his religion or belief in teaching, practice, worship and observance.

**ARTICLE 19.** Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Similarly, the Ninth International Conference of American States held at Bogota in the spring of 1948 adopted the *American Declaration of the Rights and Duties of Man* which reaffirmed the recognition by the American States "that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality". *Ninth International Conference of American States, Report of the Delegation of the United States with Related Documents*, Department of State Publication #3263, November, 1948. *The American Declaration* which was approved and signed by the United States delegation, acknowledged these essential principles:

**ARTICLE III.** Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.

**ARTICLE IV.** Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any media whatsoever.

The United States, as a nation, thus has assumed the international obligation, in addition to the constitutional guarantees contained in the First and Fourteenth Amendments, of insuring religious freedom for all of its inhabitants.

The Regents of the Board of Education of the State of New York in banning the motion picture "The Miracle", because they believed it to contain implications which they deemed "sacrilegious", have directly violated these international obligations of the United States which require

that all Americans be protected in the exercise of their religious practices and the expression of their religious opinions.

The New York Court of Appeals in affirming the action of the Regents accepts and applies a dictionary definition of "sacrilegious" as "the act of violating or profaning anything sacred." (303 N. Y. 242, 101 N. E. 2d 665, 670.) It is respectfully submitted that in view of the vast, almost infinite, variety of religious practices and beliefs existent, this definition, if, indeed, it be one at all, raises more questions than it answers. The word "sacred" is about as ambulatory as any word in our language. Transitive in nature, the concept "sacred" must always be considered in the context of who, where, when and why. One man's "sacred" cow is another man's casual repast. In the context of the decision in this case the actual standard applied emerges as "sacred" in accordance with the dogmas and tenets of a single church as they are interpreted by the most conservative groups within that church. Accordingly, this case, in its present status, stands for the proposition that the separate and individual States of the Union are free to censor and ban any communication deemed to be critical of the position assumed by any particular religious sect or power group.

However, international guarantees of freedom of religion, if they mean anything at all, must mean that each individual has the minimum freedom openly to publish and disseminate information and opinion which is contrary to the established or accepted dogma of any particular church or of all churches.

The fact that the communication in the instant case was through the medium of the motion picture, rather than through the more traditional instrumentalities of speech and press, in no way detracts from the obligation of the United States to assure freedom of communication since both the Universal and the American Declarations recognize the right to express and broadcast information and

opinion through any media whatsoever, which in 1948, the date of the adoption of both Declarations, must be understood to include the motion picture.

The international commitments for the protection of freedom of religion which our nation has assumed are particularly applicable in the instant case in view of the fact that the film which was banned by the State of New York was itself an international venture having been produced in several European nations with the objective of world-wide distribution.

The provisions of the *Charter of the United Nations* and the other explicit expressions of foreign policy which our national government has adhered to must take precedence over the statutes and policies of the State of New York.<sup>1</sup> The State of New York is bound by the nation's established foreign policy and has no reserve power or other constitutional sanction for flaunting the individual rights which the national government is obligated to safeguard and promote.

Respectfully submitted,

O. JOHN ROGGE,  
Counsel for the Committee on  
Constitutional Liberties of  
the National Lawyers Guild,  
401 Broadway,  
New York, N. Y.

<sup>1</sup> See: *United States Constitution*, Art. I, Sec. 10, cl. 1; Art. II, Sec. 2, cl. 2, Art. VI, cl. 2; *Ware v. Hylton*, 3 Dall. (U. S.) 199; *Azakura v. Seattle*, 265 U. S. 332; *Nielson v. Johnson*, 279 U. S. 47; *Hauenstein v. Lynham*, 100 U. S. 483; *Missouri v. Holland*, 252 U. S. 416; *United States v. Belmont*, 301 U. S. 331; *United States v. Pink*, 315 U. S. 203; *Hurd v. Hodge*, 334 U. S. 24; *The Federalist No. 64* (John Jay).

*LIBRARY  
SUPREME COURT, U.S.*

Office Supreme Court, U. S.  
FILED

APR 31 1952

CHARLES EUGENE CROSLEY  
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 522.

---

JOSEPH BURSTYN, INC.,

*Appellant,*

—against—

LEWIS A. WILSON, Commissioner of Education of the  
State of New York, *et al.*,

*Appellees.*

---

MOTION OF AMERICAN BOOK PUBLISHERS COUNCIL, INC.,  
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*,  
AND BRIEF OF *AMICUS CURIAE*.

---

ARTHUR E. FARMER,  
*Counsel for American Book Publishers  
Council, Inc., as Amicus Curiae.*

STERN & REUBENS,  
*Of Counsel.*

## INDEX.

	PAGE
Motion for Leave to File Brief as <i>Amicus Curiae</i> . . . . .	1
Brief as <i>Amicus Curiae</i> . . . . .	5
Statement of the Case . . . . .	5
The Issue . . . . .	6
POINT I—Sacrilege is a religious concept; the establishment of sacrilege as a basis for censorship makes the state a medium for the enforcement of religious dogma . . . . .	7
POINT II—The word "sacrilege" is so vague and indefinite as to be incapable of application with reasonable certainty. It cannot be sustained, therefore, as a permissible standard in a quasi-criminal statute . . . . .	11
POINT III—Section 122 of the Education Law imposes prior censorship upon motion pictures. If motion pictures are included within "the press", as that term is used in the First Amendment to the Constitution, then section 122 contravenes the provisions of the First Amendment prohibiting abridgement of freedom of the press . . . . .	12
Conclusion . . . . .	15

TABLE OF CASES CITED:

	PAGE
<i>Chaplinsky v. New Hampshire</i> , 315 U. S. 568 . . . . .	3, 9, 10
<i>Everson v. Board of Education</i> , 330 U. S. 1 . . . . .	8
<i>McCollum v. Board of Education</i> , 333 U. S. 203 . . . . .	8, 10
<i>Murdock v. Pennsylvania</i> , 319 U. S. 105 . . . . .	8, 9
<i>Winters v. New York</i> , 333 U. S. 507 . . . . .	9, 11

OTHER AUTHORITIES CITED:

Education Law of the State of New York:

Section 122 . . . . .	2, 6, 7, 12
Section 129 . . . . .	8, 11
Section 131 . . . . .	11

Rules and Regulations of the Regents, Section 244 . . . . .

United States Constitution:

First Amendment . . . . .	7, 8, 9, 10, 12
Fourteenth Amendment . . . . .	7

United States Supreme Court Rules, Rule 27, paragraph 9 . . . . .

# Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 522.

---

JOSEPH BURSTYN, INC.,

Appellant,

—against—

LEWIS A. WILSON, Commissioner of Education of the  
State of New York, *et al.*,

Appellees.

---

## Motion for Leave to File Brief as *Amicus Curiae*.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes AMERICAN BOOK PUBLISHERS COUNCIL, Inc., and respectfully moves this Court, pursuant to Rule 27, paragraph 9 of the Rules of this Court, for leave to file the accompanying brief in this case, *amicus curiae*. The consent of the attorney for the appellant herein to the filing of this brief has been filed with the Clerk of this Court. The consent of the attorney for the appellees has been requested but has been refused. The interest of American Book Publishers Council, Inc. (hereinafter for convenience referred to as the "Council"), and its reasons for asking leave to file a brief *amicus curiae* are set forth below.

The Council is a non-profit membership corporation organized under the laws of the State of New York.

It is concerned, among other matters, with censorship movements, legislation relating to book publishing, and similar subjects in the field of public affairs of importance to the book publishing industry.

The Council's membership includes the country's leading "trade book" publishers and university presses, among them Doubleday & Company, The Macmillan Company, Charles Scribner's Sons, Oxford University Press, Harper & Brothers, Houghton, Mifflin & Company, Harcourt, Brace & Company, Random House, Inc., Simon & Schuster, Inc., Alfred A. Knopf, Inc., and the university presses of Columbia, Harvard, Yale, Princeton, North Carolina, Minnesota, Oklahoma and Stanford. (The term "trade books" comprehends all works of fiction and non-fiction except textbooks and certain technical books, but the membership of the Council also includes the publishers of a large percentage of the textbooks and technical books published in this country.)

This case involves the question whether the Board of Regents of the State of New York may constitutionally ban the exhibition of the motion picture **THE MIRACLE**. The Council desires to file a brief *amicus curiae* on the single point that the sacrilegious nature or content of a work is not and cannot be made the basis for banning the work or making its publication, distribution or exhibition a crime.

Although the instant case is concerned with the legal effect of a finding of "sacrilege" with respect to a motion picture (under section 122 of the Education Law of the State of New York), the implications of this Court's judgment and opinion will necessarily affect books and other publications. One of the

grounds upon which the New York Court of Appeals upheld the banning of the motion picture THE MIRACLE is that "sacrilege" falls "within the 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional question'"—citing *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572. This reasoning would permit the licensing and prior censorship of books and other publications to determine whether they contain sacrilegious matter, as well as the licensing of motion pictures.

The Council deems it a public duty to present to this Court the implications of the judgment of the New York Court of Appeals in terms of the publication of books and other reading matter, and the current pressures toward censorship of ideas. Neither the appellant nor the appellees is concerned with these phases of the appeal—but in the opinion of the Council they are of even greater importance to the citizens of the United States than the immediate issue of whether sacrilege may constitutionally serve as a basis for the censorship of motion pictures.

The Council therefore respectfully requests the permission of this Court to file the attached brief, *amicus curiae*.

Respectfully submitted,

ARTHUR E. FARMER,  
*Counsel for American Book  
Publishers Council, Inc.*

Dated: April 17th, 1952.



# Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 522.

---

JOSEPH BURSTYN, INC.,

*Appellant,*

—against—

LEWIS A. WILSON, Commissioner of Education of the  
State of New York, *et al.*,

*Appellees.*

---

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC.  
*AMICUS CURIAE.*

## Statement of the Case.

In March 1949, the Motion Picture Division of the Education Department of the State of New York, issued a license to Lopert Films, Inc. for the exhibition of the motion picture entitled THE MIRACLE. In November 1950, the same authority again issued a license for the exhibition of THE MIRACLE, this time to the appellants. On February 16, 1951, the Board of Regents of the State of New York, as governors of the Education Department, revoked the license theretofore issued under its authority. The effect of the revocation of the license was to make it a criminal offense to exhibit the motion picture publicly within the State of New York.

Section 122 of the Education Law of the State of New York provides, in pertinent part, as follows:

"The director of the (motion picture) division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor."

Section 244 of the Rules and Regulations adopted by the Regents in effect repeats the provisions of section 122 of the Education Law. The Regents based their revocation of the license theretofore issued under their authority upon the ground that the motion picture **THE MIRACLE** was sacrilegious.

### **The Issue.**

The proposition to be argued in this brief is that section 122 of the Education Law and Section 244 of the Rules and Regulations of the Regents are unconstitutional insofar as they postulate sacrilege as a ground for refusing or revoking a license to publicly exhibit a motion picture in the State of New York—

1. Because the State thereby assumes to enforce the religious views of a group or groups within the community;
2. Because the standard prescribed is so vague and indefinite as to be incapable of application with reasonable certainty; and

3. If the Court shall conclude that motion pictures are a part of "the press" within the meaning of the First Amendment to the Constitution of the United States, said provisions contravene the constitutional guarantee of freedom of the press.

Involved in the first proposition is so much of the First Amendment to the Constitution of the United States as prohibits Congress from making any law respecting an establishment of religion or prohibiting the free exercise thereof, as applied to the several states by the Fourteenth Amendment; involved in the second proposition is the application of that part of the Fourteenth Amendment which provides that no state shall deprive any person of property without due process of law; involved in the third proposition is the prohibition against abridgment of freedom of the press, contained in the First Amendment and made applicable to the several states by the Fourteenth Amendment.

### **POINT I.**

**Sacrilege is a religious concept; the establishment of sacrilege as a basis for censorship makes the state a medium for the enforcement of religious dogma.**

That "sacrilege" is a religious concept, irrespective of the precise definition to be given to the word, is implicit both in the opinions of the courts below and in the briefs of counsel. It follows that section 122 of the Education Law, by prescribing sacrilege as one of the grounds upon which a license for the exhibition of a motion picture may be refused, sets up a

religious standard for banning the exhibition of a motion picture under penalty of criminal prosecution (N. Y. Education Law, section 129). This must necessarily be so, irrespective of the extent or difficulty of the religious judgment to be formed. If it is true, as stated by this Court in both *Everson v. Board of Education*, 330 U. S. 1, 18, and *McCollum v. Board of Education*, 333 U. S. 203, 212, that the First Amendment has erected a wall between Church and State which must be kept high and impregnable, it would seem clear beyond cavil that a religious standard may not be enforced by a State.

The state's interposition of its agencies between the sensibilities of religious people and those who attack religion, either by way of lampoon and ridicule or by direct assault, is no less an attempted breach of the high and impregnable wall between Church and State because of the presumptive good motives which prompted the legislation. In *Murdock v. Pennsylvania*, 319 U. S. 105, Mr. Justice Douglas, delivering the opinion of the Court, said (pp. 115-116):

"Considerable emphasis is placed on the kind of literature which petitioners were distributing —its provocative, abusive and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. \* \* \* But those considerations are no justification for the license tax which the ordinance imposes. Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minor-

ity cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights."

The prevailing opinions in the N. Y. Court of Appeals lay considerable stress on the fact that distributors and exhibitors of motion pictures are "engaged in selling entertainment" (303 N. Y. 258); that a motion picture is "a commercial entertainment spectacle" (303 N. Y. 259), and that religious beliefs should be protected from "purely private or commercial attacks or persecution" (303 N. Y. 259). But where the issue relates to the separation of Church and State, the question whether a motion picture is entertainment or whether it is informational, is wholly irrelevant. In *Winters v. New York*, 333 U. S. 507, 510, this Court held specifically, in relation to the constitutional protection for a free press, that the line between the informing and the entertaining is too elusive for the protection of that basic right. Such a distinction is no less elusive and illusory in construing that part of the First Amendment which prohibits the establishment of religion or restraints upon the free exercise thereof.

It is particularly noteworthy that in the Court of Appeals, both Judge Froessel and Judge Desmond quoted the following statement from *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572, as justification for upholding sacrilege as a ground for censorship:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the

lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

Should this basis for upholding the action of the Board of Regents be sustained, then by like reasoning not only the punishment, but also the prevention, of the publication of sacrilegious books, articles and other printed matter would necessarily be upheld. There can be no logical reason advanced for preferring those provisions of the First Amendment which protect the freedom of the press over the provisions of the First Amendment which prohibit an establishment of religion. Nothing could more clearly emphasize the danger implicit in sustaining the judgment from which this appeal has been taken.

The majority opinion in the Court of Appeals argues that "the offering of public gratuitous insults to recognized religious beliefs by means of commercial motion pictures \* \* \* constitutes in itself an infringement of the freedom of others to worship and believe as they choose" (303 N. Y. 259-260). We question the validity of this statement. But even were it to be accepted at face value, it would seem that this consideration would be far outweighed by the necessity of guarding against an invasion of the principle that " \* \* \* both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere" (*McCollum v. Board of Education*, 333 U. S. 203, 212).

## POINT II.

The word "sacrilege" is so vague and indefinite as to be incapable of application with reasonable certainty. It cannot be sustained, therefore, as a permissible standard in a quasi-criminal statute.

Coming before this Court as *amicus curiae*, we are especially conscious of our obligation not to burden the Court with unnecessary prolixity. Therefore, in support of this point we will merely refer this Court to the opinion of Mr. Justice Reed in *Winters v. New York*, 333 U. S. 507. The standard of "sacrilege" is no less vague and indefinite than the standard prescribed in the statute there considered. Because it is generally understood that less definiteness is required in a statute prescribing civil liability than in one which involves criminal penalties, we call this Court's attention to the fact that under the provisions of section 129 of the N. Y. Education Law it is unlawful to exhibit in the State of New York a motion picture subject to the license provisions of the statute, unless there is at the time in full force and effect a valid license or permit therefor, and that section 131 of the Education Law provides that a violation of the statute shall be a misdemeanor.

### POINT III.

**Section 122 of the Education Law imposes prior censorship upon motion pictures. If motion pictures are included within "the press", as that term is used in the First Amendment to the Constitution, then section 122 contravenes the provisions of the First Amendment prohibiting abridgement of freedom of the press.**

Both the opinion of Mr. Justice Fuld in the N. Y. Court of Appeals and appellant's brief have so fully argued the point that motion pictures must, as the result of technological progress and current mores, today be considered a part of "the press", that we feel that we cannot add to what they have said. Assuming that this Court will agree with their conclusion, the statute must be construed in the same manner as if it applied to books and other publications.

So applied, there can be no doubt that such classics as Voltaire's **CANDIDE**, and **THAIS** and **THE REVOLT OF THE ANGELS** by Anatole France, would be banned as sacrilegious. And unless the religious sensibilities of the Mormons and the Christian Scientists are to be regarded more lightly than those of the Catholics, Mark Twain's **ROUGHING IT** and **CHRISTIAN SCIENCE** would also be proscribed. In like manner, among recent books the publication of Paul Blanshard's **AMERICAN FREEDOM AND CATHOLIC POWER** and **COMMUNISM, DEMOCRACY AND CATHOLIC POWER** would be unlawful. Once this type of censorship begins it is impossible to predict where it will end. The measure of acceptability may be the tolerance of a William

Penn or the passionate singlemindedness of a Savonarola or a John Wesley. The attempted differentiation made by Mr. Justice Froessel, in the New York Court of Appeals between a treatment of religion with contempt, mockery, scorn, ridicule and insult, and the expression of any religious or anti-religious sentiment through a *proper* use of the films (303 N. Y. 258-259), is specious. A vitriolic attack may seem to one in sympathy with the writer to be the purest expression of uncontrovertible logic, while to a follower of the religion attacked it may seem to be no more than a hurling of insults, contempt, mockery, scorn and ridicule at his most sacred religious beliefs. We cannot delimit—we cannot strangle—the right of free expression in order to spare the sensibilities of the individual.

In still another aspect the implications of the situation which have resulted in the banning of THE MIRACLE are far greater than the question of whether one motion picture film or all motion picture films may be banned as sacrilegious. It is apparent from the record that the action of the Regents revoking the license theretofore granted for the exhibition of THE MIRACLE was prompted largely by the agitation of a minority group. Yielding to this pressure, the Regents adopted a procedure which, whether legal or not, was wholly without precedent.

This course of conduct is part of a picture which is being repeated time and again throughout the country. In some communities, pressure groups of various complexions are seeking to enforce their views of Americanism upon universities and colleges by attacks upon members of their faculties; in others,

minority groups seek to cause the removal of "objectionable" volumes from the local library. Similar groups are using illegal but uncombatable boycotts and threats of boycott to remove reading matter from the shelves of retailers. Other organizations have attempted to cause the withdrawal of such literary classics as **THE MERCHANT OF VENICE** and **OLIVER TWIST** (the latter in motion picture form). In many instances, books and motion pictures are attacked not for their content, but because of the political beliefs of the persons who created them. The question is no longer the merit and the intellectual content of the work, but whether the author of the book or of the script is a Communist or a fellow-traveler, or was, at some time in the distant past, a member of an organization which, in the light of later day developments, has been branded subversive.

These facts are so notorious and today's newspapers and magazines are so replete with instances, that no one conversant with the present atmosphere in the United States can fail to recognize them. It is in the light of this miasma of censorship, repression and fear of the written and spoken word that this case comes before the Court. If our democracy is to survive, the belief that the American people are capable of considering conflicting ideas and philosophies—of rejecting those which are evil and accepting those which are in accord with the basic principles upon which this country was established and has survived—must be restored.

### Conclusion.

The thought that an idea offensive to a minority group, or even to an overwhelming majority in the United States, may be banned under color of law, is foreign to the basic principles of intellectual freedom which have been written into the Constitution and proclaimed by this Court. It makes little difference whether this case be reversed upon the ground that the statute represents an illegal interference with the Constitutional guaranty of freedom of the press, or because it establishes religion by State action or permits the State by its constituted agent, the Regents, to uphold certain religious tenets as against the right of the citizenry who do not subscribe to those tenets to be addressed in words or in pictures in terms which they find acceptable. The important concept—the great issue—in this case is the preservation of intellectual freedom as the keystone of any democratic form of government.

**The American Book Publishers Council, Inc. respectfully urges that the judgment of the New York Court of Appeals herein be reversed.**

Respectfully submitted,

ARTHUR E. FARMER,  
*Counsel for American Book Publishers  
Council, Inc., as Amicus Curiae.*

STERN & REUBENS,  
*Of Counsel.*